

LAW AND CHANGE

REJECTING (IN)TOLERANCE: CRITICAL PERSPECTIVES ON THE UNITED NATIONS YEAR FOR TOLERANCE*

[The United Nations declared 1995 the Year for Tolerance. This article is composed of two short, linked pieces which critically examine the notion of tolerance and its use as a discursive mechanism for the purported promotion of human rights. The pieces highlight the exclusions of women and gay men and lesbians from the United Nations' program for the Year for Tolerance. One piece examines the interaction between tolerance and gender, while the other piece examines the interaction between tolerance and sexuality. The thesis of the two pieces is that tolerance may take one of several forms, but that in its most common form, negative tolerance, it operates as a mechanism of repression rather than as an emancipatory doctrine.]

The General Assembly, ... Convinced that tolerance — the recognition and appreciation of others, the ability to live together with and to listen to others — is the sound foundation of any civil society and of peace ...

United Nations General Assembly¹

tolerance: Willingness to tolerate, forbearance.

tolerate: Endure, permit ...; allow (person, religious sect, opinion) to exist without interference ...; endure with forbearance

The Concise Oxford Dictionary²

This valuing of all contributions equally should not be confused with the male defined meaning of *tolerance*. Tolerance can only be exercised by those who are in power and it is often nothing but another means of protecting that power. Tolerance does not eradicate the distinction between right and wrong, it simply makes being in the wrong slightly less offensive.

Dale Spender³

THE UNITED NATIONS YEAR FOR TOLERANCE

In 1993, the United Nations General Assembly, acting on the initiative of the Economic and Social Council (ECOSOC), proclaimed 1995, the year marking the 50th anniversary of the UN, the International Year for Tolerance.⁴ The initial proclamation did little other than encourage UN bodies, member states and non-governmental organisations to contribute to the preparations for the

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¹ GA Res 126, 48 UN GAOR (85th plen mtg), UN Doc A/Res/48/126 (1993), Preamble para 5.

² *The Concise Oxford Dictionary* (6th ed, 1978).

³ Dale Spender, *Man Made Language* (1980) 104.

⁴ GA Res 126, above n 1.

Year. Subsequently, however, UNESCO has produced a number of documents about the Year for Tolerance. In its 'Mission Statement', UNESCO states that:

Intolerance is one of the greatest challenges confronting us on the eve of the twenty-first century. Intolerance is both an ethical and political issue. It is the rejection of differences among individuals and cultures. When intolerance becomes collective or institutionalized, it erodes democratic principles and poses a threat to world peace.⁵

In UNESCO's view, 'diversity enriches our world'. Thus, tolerance is

respecting others' rights and freedoms recognition and acceptance of individual difference the appreciation of cultural diversity recognition that no individual culture, nation or religion has the monopoly of knowledge or truth freedom from prejudice⁶

and, finally, tolerance is 'a positive attitude towards others with no trace of condescension'.⁷ However, this broad and enlightened approach to the concept of tolerance does not reflect the meaning of that term as it has been used in traditional Western liberal thought. It might have been more appropriate for the United Nations to celebrate the Year of Diversity, rather than the Year for Tolerance.

The material provided by UNESCO in connection with the Year for Tolerance focuses primarily on issues of race, ethnicity and religion.⁸ The public attitudes which UNESCO wishes to counter include: racism, ethnocentrism, extreme nationalism, xenophobia and religious animosity.⁹ These aims are obviously laudable, but reveal a limited focus by the UN in its understanding of tolerance. While there is no express denial of the need for diversity and freedom from prejudice based on gender or sexuality, neither is there any express reference to discrimination and violence based on these categories. Indeed, UNESCO lists some of the minority groups who suffer hate crimes: 'non-nationals, refugees and asylum seekers, indigenous peoples, migrant workers, human rights activists, writers, intellectuals, journalists ... the list goes on',¹⁰ without mentioning lesbians or gay men, or women generally. The absence is instructive. Ultimately, the Year for Tolerance is driven by a desire to prevent violence and armed conflict resulting from religious, racial or ethnic differences.¹¹ While eminently understandable and worthwhile, this approach fails to even

⁵ 'Mission Statement' in UNESCO Information Kit, 1995 — *A Year For Tolerance* (1995) 1. Our original conception for this joint article included a critique of tolerance in the areas of race and culture. Unfortunately, this did not eventuate.

⁶ *Ibid.*

⁷ 'Backgrounder' in UNESCO, above n 5, 2.

⁸ See the following in UNESCO, above n 5: '1995 — United Nations Year for Tolerance', 1; 'Educating for Tolerance...', 1-2; '1995 — Some Publications'; 'A Cooperative Venture...', 2; 'Special Events Planned for 1995'.

⁹ '1995 — United Nations Year for Tolerance' in UNESCO, above n 5, 1.

¹⁰ 'Backgrounder' in UNESCO, above n 5, 1-2.

¹¹ See the following in UNESCO, above n 5: 'Backgrounder', 1; '1995 — United Nations Year for Tolerance', 1-2; 'An Independent Media for Tolerance and Peace', 1-2; 'Educating for Tolerance...', 1.

consider other violence associated with difference because such violence is not understood as a threat to world peace and security. Once again, the 'public' nature of certain human rights issues (public in the sense that they directly affect relations between states and thus threaten world peace) means those issues are considered to be a legitimate and important focus for action. In contrast, the 'private' nature of others (private in the sense that they are not likely to result directly in armed conflict between states) means that they are ignored or relegated to the periphery.

In the following pieces, we set out to explore the meanings of tolerance in relation to sexuality and gender. We conceive of three broad ways in which tolerance may be practised. First, tolerance may have the negative effect of containing difference within parameters that minimise the potential challenge to the universalising narratives of traditional masculinist, heterosexist sensibility (negative tolerance, or containment). Secondly, the idea of tolerance may provide a measure of protection for some difference in a pluralist context and a liberal rhetoric with which to argue the extension of that protection (pluralist tolerance). Thirdly, tolerance could enable the affirmative promotion of difference in a way that contests current structural inequalities in power (emancipatory tolerance). By analysing UN practice and international human rights law dealing with issues of sexuality and gender, we illustrate the roles which the concept of tolerance has traditionally played in these areas. Our analyses reveal that international practice and jurisprudence dealing with sexuality and gender is located within the first (or, occasionally, the second) of these approaches to tolerance, both of which fall far short of the outcomes envisaged by UNESCO.

TOLERANCE: A GENDERED TECHNOLOGY OF POWER

DIANNE OTTO*

Nomination of 1995 as the International Year for Tolerance (IYT),¹ prompted by the post Cold War proliferation of localised ethnic, racial and religious conflicts, may seem apt.² The UN's toleration discourse rests, however, on a restrictive understanding of 'world peace' which prioritises the protection/promotion of certain differences over others. The effect is to reinforce dominant relations of power which ultimately, in my view, exacerbates the likelihood of conflict and violence. Using the example of gender difference, I

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¹ GA Res 126, 48 UN GAOR (85th plen mtg), UN Doc A/Res/48/126 (1993).

² 'Backgrounder' in UNESCO Information Kit, 1995 — *A Year For Tolerance*, 1, indicates that, globally, there were at least 90 armed conflicts between 1989 and 1994 of which only four were interstate conflicts.

will argue that the UN's promotion of tolerance in the face of difference is exclusionary in its scope, conservative in its application and partial in its effect. I ask whether the notion of tolerance has emancipatory dimensions or, alternatively, whether is it so constricted in its application, and imbued with masculinist and Eurocentric meaning, that it needs to be rejected altogether as a progressive strategy.

On the surface, the progressive credentials of the idea of tolerance appear beyond reproach. The Preamble to the Charter of the UN identifies the practice of tolerance as a necessary component of the peaceful and neighbourly coexistence of states. Several human rights instruments identify the spirit of tolerance as something which education systems should promote, along with 'understanding' and 'friendship' among nations and racial, ethnic and religious groups.³ Tolerance is understood as an attribute of a free and peaceful world community and as a principle which should guide interactions between diverse states and between multiplicitous individuals. It is often associated with concepts of democracy, multi-culturalism and social justice.

The official documents of the IYT echo these views. 'Intolerance' is described as 'the rejection of differences among individuals and cultures [that when institutionalised] erodes democratic principles and poses a threat to world peace'.⁴ In contradistinction, the idea of 'tolerance' is promoted as a means for the international community to peacefully manage disputes precipitated by difference and diversity.⁵ This raises three critical issues which will structure the following discussion. First is the question of which differences qualify for 'management' under the tolerance rubric. Second is the matter of the connection between difference and power and whether this is addressed in the UN strategy of 'difference toleration'. The third issue concerns the type of the protection/promotion of difference offered by the concept of tolerance and whether it has transformative possibilities.

Before turning to these questions, a word on the category of 'difference' is necessary. It is important to recognise that the identification of difference is not a benign activity. Modern institutions of government, originating in the social sciences of the West but now operating globally as the result of the 'civilising mission' of colonialism, turn difference to the advantage of the *status quo* by fixing identities into precise categories in the name of distributive justice and procedural fairness.⁶ The resulting statistical ordering and policing of differ-

³ Universal Declaration of Human Rights, GA Res 217A (III), 3 UN GAOR 135, UN Doc A/810 (1948) art 26(2); International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3; 6 ILM 360 (entered into force 1976) art 13(1); International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 7 March 1966, 60 UNTS 195; 5 ILM 352 (entered into force 1969) art 7; International Convention on the Rights of the Child, opened for signature 20 November 1989, 28 ILM 1448; 29 ILM 1340 (amendments) (entered into force 1990) art 29(1)(d).

⁴ 'Mission Statement' in UNESCO, above n 2, 1.

⁵ *Ibid.*

⁶ Dipesh Chakrabarty, 'Modernity and Ethnicity in India' in David Bennett (ed), *Multicultural States* (forthcoming, 1996).

ence is a mechanism of social control central to 'good government', as understood in the modern European framework.⁷ In this way, difference becomes a disciplinary tool of the modern state which reinforces the dominance of European hegemony. These techniques have been promulgated at the global level by the UN Charter which fosters a system of universal 'governmentality'.⁸ This makes it essential to interrogate the actual categories of difference, in addition to examining the hierarchies of power which these categories serve.

The category of gender is a central trope in the universalising discourse of European modernity. As a result, woman 'is a gendered subject position'⁹ brought into being by the dominant discourse of the international community which is Eurocentric, masculinist and middle-class.¹⁰ As Radhika Coomaraswamy points out about the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),¹¹

[t]he personality that is privileged in such documents is the free, independent woman as an individual endowed with rights and rational agency. It is, in fact, the culmination of the enlightenment project, the 'rights of man' now being enjoyed by women.¹²

However, examination of the UN gender discourse through the filter of toleration reveals that even the unsatisfactory goal of the enjoyment of 'the rights of man' by women in the West is not, in fact, the result. The promotion of tolerance as a desirable social value helps to explain how the difference of gender remains such a powerful justification for inequality and subjugation, even in the rights-oriented discourse of the West.

I INCLUSIONS/EXCLUSIONS

I turn now to the first issue of the types of difference which qualify as targets of the promotion of tolerance. The UN documents outlining the goals of the IYT identify disputes associated with ethnic, religious, national, cultural and racial differences as the objects of a toleration strategy. There is also a recognition that tolerance needs to extend to journalists, writers, intellectuals and others who must be free to express their views. That's it. Complete silence surrounds a host of other differences including gender, sexuality, wealth, age and class.

⁷ Michel Foucault, 'Governmentality' in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault Effect: Studies in Governmentality* (1991) 87, 104.

⁸ For example, the United Nations Charter, art 62(1) gives the Economic and Social Council a broad brief to study and report on international economic, social, cultural, educational, health, and related matters.

⁹ Carol Smart, 'The Woman of Legal Discourse' (1992) 1 *Social and Legal Studies* 29, 34.

¹⁰ The work of Western feminists has also been implicated in uncritically adopting some aspects of this dominant European discourse: see, eg, Marnia Lazreg, 'Feminism and Difference: The Perils of Writing as a Woman on Women in Algeria' (1988) 14 *Feminist Studies* 81; Hilary Charlesworth, 'Women and International Law' (1994) 19 *Australian Feminist Studies* 115.

¹¹ Opened for signature 1 March 1980, annexed to GA Res 180, 34 UN GAOR (107th plen mtg), UN Doc A/Res/34/180 (1979).

¹² Radhika Coomaraswamy, 'To Bellow like a Cow: Women, Ethnicity, and the Discourse of Rights' in Rebecca Cook (ed), *Human Rights of Women: National and International Perspectives* (1994) 39, 40.

Yet the excluded categories of difference add important dimensions to understanding how difference operates to precipitate global violence. At a minimum, the omitted differences have considerable consequences at the point of intersection with the officially recognised list. For example, the promotion of religious tolerance may have the effect of condoning certain sorts of gendered violence.¹³ Further, the excluded differences may also be understood in their own right to pose a threat to world peace. Using the example of gender again, the prevalence of violence against women can be understood as central to normalising global militarism (the use of force to 'resolve' almost everything), which brings the problem of the operation of gender difference squarely into the frame of constituting a threat to world peace.¹⁴ This suggests that the current international order is reliant on the disciplinary violence associated with some forms of difference and is, therefore, only interested in promoting tolerance (as another form of discipline) towards differences that are perceived as potentially threatening to the *status quo*. The result of reinforcing the inequitable *de facto* distribution of global power has come to be indistinguishable from the goal of protecting world peace.

Even the coincidence of the IYT and the 4th UN Conference on Women to be held in Beijing has not prompted a revision of the tolerance agenda to include women. My search through the IYT Information Kit finally yielded a reference to women among the IYT publications in the form of an anthology entitled 'The Role of Women in Promoting a Spirit of Tolerance'.¹⁵ This reveals how the category of gender is harnessed as a tactic of tolerance: women have a place as nurturers and purveyors of tolerance, rather than as its objects or subjects. This image reverberates in the preamble of the UNESCO Constitution, quoted in the IYT materials, which makes the fascinating observation that 'since wars begin in the minds of men, it is in the minds of men that the defences of peace must be constructed'. Gender difference in the toleration paradigm clearly positions men at centre-stage of global activity and women as the auxiliary background presence which counsels reason, forbearance and tolerance.

II DIFFERENCE/POWER

The second issue, also an absence in the UN's identification of key categories of difference, is the recognition that difference is an issue of power. As difference is understood in the hegemonic modern European framework, it comprises

¹³ Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613, 635-6; Anika Rahman, 'Religious Rights Versus Women's Rights in India: A Test for International Human Rights Law' (1990) 28 *Columbia Journal of Transnational Law* 473; Asma Mohamed Abdel Halim, 'Challenges to the Application of International Women's Human Rights in the Sudan' in Rebecca Cook (ed), *Human Rights of Women* (1994) 397, 412.

¹⁴ Ann Scales, 'Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron?' (1989) 12 *Harvard Women's Law Journal* 25, 43-4: 'If domination and submission were not so *usual*, not so embedded in our experiences of gender, the military would not be able to transform entire populations into The Other.'

¹⁵ 'Some Publications' in UNESCO above n 2, 1.

a dual relationship of power involving both domination and subordination/resistance.¹⁶ The characteristics of the dominant position are (mis)taken as the neutral standard of universal normality against which difference is measured. The reference point thereby globally normalised is, in fact, masculinist and Eurocentric.¹⁷ Difference, then, is the technique used to justify and naturalise inequalities in power, knowledge and wealth. This disguises the reality that it is the resulting struggle over knowledge/power that precipitates international conflict, not the fact of difference itself.

It follows that the UN toleration approach protects differences in power rather than protecting the world's diversity. The 'solution' of tolerance does nothing to challenge the current balance of power in the international community. In fact, as I have suggested, the international *status quo* is reliant on ideas like tolerance, which claim impartiality, to counteract and contain challenges to the global maintenance and legitimisation of enormous differences in power. Tolerance in this sense is 'exercised by those who are in power and ... is often nothing but another means of protecting that power'.¹⁸

The CEDAW provides a good example of the erasure of the operation of regimes of power from the understanding of gender difference. As Coomaraswamy observes, the 'emphasis is on the principle of nondiscrimination, and not on the principle of empowerment'.¹⁹ Indeed, there is no mention whatsoever of gendered violence as an issue related to the maintenance of discrimination against women.²⁰ Yet violence against women by men is the most common form of violence internationally²¹ and, as the recently adopted UN Declaration on Violence Against Women declares, 'is one of the social mechanisms by which women are forced into a subordinate position compared with men'.²² Viewing this within a toleration paradigm suggests that CEDAW's silence about gendered power relations makes it complicit in constructing difference as benignly determined and in obscuring its operation as a technique of power.

¹⁶ Joan Scott, 'Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism' (1988) 14 *Feminist Studies* 33, 46; Catharine MacKinnon, 'Difference and Dominance: On Sex Discrimination' in Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (1987) 32.

¹⁷ Clare Dalton, 'The Faithful Liberal and the Question of Diversity' (1989) 12 *Harvard Women's Law Journal* 1, 2.

¹⁸ Dale Spender, *Man Made Language* (1980) 104.

¹⁹ Coomaraswamy, above n 12, 40.

²⁰ The CEDAW Committee has tried to address this absence in its adoption of General Recommendation 19, 47 UN GAOR, Supp No 38, UN Doc A/47/38 (1992), which states that 'gender discrimination includes gender-based violence'. See discussion by Hilary Charlesworth and Christine Chinkin, 'Violence Against Women: A Global Issue' in Julie Stubbs (ed), *Women, Male Violence and the Law* (1994), and text accompanying nn 54-69.

²¹ Christine Chinkin, 'Women and Peace: Militarism and Oppression' in Kathleen Mahoney and Paul Mahoney (eds), *Human Rights in the Twenty-First Century: A Global Challenge* (1993) 405, 410.

²² Declaration on the Elimination of Violence Against Women, GA Res 104, 48 UN GAOR, UN Doc A/Res/48/104 (1993), Preamble. See discussion in Dianne Otto, 'Violence Against Women — Something Other than a Human Rights Violation?' (1993) 1 *Australian Feminist Law Journal* 159.

III CONTAINMENT/PROTECTION/TRANSFORMATION

Recognition of both the limited range of differences associated with tolerance and the absence of a rejection of the hierarchies of power that are justified by the idea of difference, leads into the third question regarding the nature of the treatment of difference promised by toleration. There are three broad possibilities.²³ First, tolerance may simply have the negative effect of containing difference within parameters that minimise the potential challenge to the universalising narratives of European masculinist sensibility. Secondly, the idea of tolerance may provide a measure of protection for some difference in a pluralist context and contribute a liberal rhetoric with which to argue extension of that protection/promotion. Thirdly, tolerance could enable the affirmative promotion of difference in a way that contests the inequalities in power that the idea of difference currently supports. I will explore these constructions of tolerance in turn, continuing to use gender as illustrative of the general schema, despite its absence from the official tolerance list. In so doing, I am suggesting that the tolerance paradigm offers some useful insights into the management of gender within the international community and casts strong doubt on any suggestion that the promotion of tolerance could be a liberatory strategy.

1 *Negative Toleration — Containment*

The first possibility is that toleration is understood as a minimalist and pragmatic contribution to the prevention of war. Difference, as distinct from normality, is identified as a cause of conflict and human suffering which necessitate its containment and control.²⁴ To the extent that it is not suppressed, difference is tolerated as a necessary evil, in a trade-off against its potential to precipitate disaster. In this view, difference is a negative liberty²⁵ which is protected by limited guarantees of 'non-interference' in the private sphere.²⁶ As a result of their confinement to the private realm, differences are, by definition, unable to endanger the dominant distribution of power.²⁷ This approach promotes an attitude of forbearance to difference as the lesser of two evils.

Many aspects of the management of gender differences by the international community, when analysed within the rubric of tolerance, fall within the

²³ Robert Wolff, 'Beyond Tolerance' in Robert Wolff, Barrington Moore Jr and Herbert Marcuse (eds), *A Critique of Pure Tolerance* (1969) 11, 23-6, identifies three justifications for pluralism that correspond to the three perspectives on tolerance that I outline.

²⁴ The containment and control of 'abnormal' sexuality by tolerance discourse is discussed below: see Wayne Morgan and Kristen Walker, 'Tolerance and Homosex: A Policy of Control and Containment'.

²⁵ Lord Scarman, 'Toleration and the Law' in S Mendus and D Edwards (eds), *On Toleration* (1987) 49.

²⁶ Feminists have shown that this purported non-interference is a myth, that the state indirectly and directly regulates activity in the private and that the result is highly gendered. Because of this result, and the particular tactics associated with the privacy narrative that are used to achieve it, the construct of the private sphere still has theoretical usefulness, though not as a space of non-interference: see, eg, Katherine O'Donovan, *Sexual Divisions in Law* (1985) 7-8.

²⁷ Chantal Mouffe, 'Rawls: Political Philosophy Without Politics' in David Rasmussen (ed), *Universalism v Communitarianism: Contemporary Debates in Ethics* (1990) 217, 222.

restrictive domain of negative toleration. Although CEDAW is generally seen as a progressive development,²⁸ some aspects of CEDAW approximate the minimalist strategy. While CEDAW's definition of discrimination against women is notable for its direct foray into the arena of the private,²⁹ this is seriously compromised by the pervasiveness of a traditional view of women, which contains women's difference within the limited range of motherhood and family responsibilities. For example, the Convention supports protective legislation regulating women's workforce participation,³⁰ emphasises the paramountcy of the interests of children within the family,³¹ refers to family planning information in the context of the health and well-being of *the family*,³² omits any mention of discrimination against lesbians and fails to ensure access to, and choice about, abortion.³³ In Sarah Zearfoss's assessment, '[t]he net effect ... may be to strengthen a traditional image of women as mothers, albeit mothers with rights'.³⁴

Further, the Convention completely negates any implications it might otherwise have had for intervention in the private sphere by its failure to recognise gendered differences in power within families. In its silence about violence in the domestic sphere, the provisions which assume a partnership approach between women and men — for example in relation to responsibility for the upbringing and development of their children,³⁵ in deciding the number and spacing of their children³⁶ and in access to family planning services³⁷ — deny the unequal distribution of power within families. This has the effect of fortifying masculinist power.

In sum, some aspects of CEDAW approach the task of promoting gender equality by qualifying women's access to 'the rights of man'. This is achieved by containing the differences of women within a traditional view of women's domestic activities and by failing to come to grips with gendered arrangements of power in the domestic sphere. The result is that large areas of gendered difference are left to be regulated by the masculinist regimes of power in the private. The idea of toleration is part of the arsenal of disciplinary devices that serve to camouflage this effect.

²⁸ Natalie Hevener, 'An Analysis of Gender Based Treaty Law: Contemporary Developments in Historical Perspective' (1986) 8 *Human Rights Quarterly* 70, 86.

²⁹ The broad definition of discrimination in art 1 includes discrimination 'in the political, economic, social, cultural, civil or any other field', the latter including the private sphere.

³⁰ CEDAW, above n 11, arts 4(2), 11(1)(f), 11(2)(d). Art 11(3) does require that protective legislation be reviewed periodically.

³¹ *Ibid* art 5(b).

³² *Ibid* art 10(h).

³³ Renee Holt, 'Women's Rights and International Law: The Struggle for Recognition and Enforcement' (1991) 1 *Columbia Journal of Gender and Law* 117, 133.

³⁴ Note (Sarah Zearfoss), 'The Convention for the Elimination of All Forms of Discrimination Against Women: Radical, Reasonable, or Reactionary?' (1991) 12 *Michigan Journal of International Law* 903, 916.

³⁵ CEDAW, above n 11, art 5(b).

³⁶ *Ibid* art 16(e).

³⁷ *Ibid* art 12(1).

The CEDAW also provides an example of how minimal a minimalist position may be in the name of tolerance. Although it is a human rights convention with one of the highest number of ratifications, states parties have registered a large number of substantive reservations to its provisions, making it probably the most heavily reserved of the human rights instruments.³⁸ In the view of many states some of the reservations, particularly those asserting the supremacy of Islamic laws, are incompatible with the purpose of the Convention.³⁹ Attempts by the CEDAW Committee to address this, in the absence of provision in the Convention for determining incompatibility, were thwarted by ECOSOC and the General Assembly, leaving CEDAW accused of religious intolerance and the issue unresolved.⁴⁰ Nor is the problem confined to conflicts with Islamic Shariah law. The reservations to CEDAW proposed by the US Department of State under President Carter, if adopted, would also have rendered the Convention largely nugatory.⁴¹ It would appear that, in relation to gender difference, the tolerance threshold is so minimal as to be, arguably, illusory.

2 *Pluralist Toleration — Protection*

Secondly, tolerance may be understood as an attribute of democratic pluralism which enables a diversity of viewpoints to be heard and taken into account. To a point, this approach parallels the first position of negative liberty by largely confining the toleration of difference to the private sphere, but it also adds important public dimensions to the scope of tolerance. In the public realm of politics, difference is recognised in the form of a pressure group or a category of benevolence which may, at times, be influential. Positive rights may also attach to certain differences providing some protection for the interests of groups who fall into the category thus recognised. This generally takes the form of granting 'minority' rights. Pluralist toleration gives the appearance of widely embracing diversity, but the reality is that the differences tolerated are only those which are coextensive with the liberal paradigm.⁴² Differences that are oppositional to or incompatible with the dominant standard are excluded by 'the ferocious standardizing benevolence of most US and Western European human-scientific radicalism'⁴³ from the consensus politics of liberal pluralism.

³⁸ Rebecca Cook, 'Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women' (1990) 30 *Virginia Journal of International Law* 643, 644; Andrew Byrnes, 'The "Other" Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women' (1989) 14 *Yale Journal of International Law* 1, 52.

³⁹ Belinda Clark, 'The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women' (1991) 85 *American Journal of International Law* 281, 283.

⁴⁰ *Ibid* 288.

⁴¹ Zearfoss, above n 34, 926-40.

⁴² Jonathon Chaplin, 'How Much Cultural and Religious Pluralism can Liberalism Tolerate?' in John Horton (ed), *Liberalism, Multiculturalism and Toleration* (1993) 48; Chakrabarty, above n 6, 17 (of manuscript).

⁴³ Gayatri Spivak, 'Can the Subaltern Speak?' in Cary Nelson and Lawrence Grossberg (eds), *Marxism and the Interpretation of Culture* (1988) 271, 294.

The pluralist approach is most evident in the UN's promotion of tolerance. Strategies for the IYT include public sphere interventions like reviewing legislative, public policy and educative promotion of tolerance in order to ensure that 'no individual culture, nation or religion has the monopoly of knowledge or truth.'⁴⁴ Such high-minded ideals, however, are not realised in practice because the hegemony of the dominant arrangements are never fundamentally challenged by a pluralist approach. However, the pluralist paradigm arguably provides more opportunities for contestation in the context of liberalism's commitment to equality and liberty than does the negative position of non-interference.

Some aspects of this approach are also evident in CEDAW's provisions. The Convention does promote equality for women in the public realms of national and international politics, education, employment, health care and other areas of social and economic life.⁴⁵ But the standard of these public rights is male-defined and the attitude towards gender difference is assimilationist.⁴⁶ That is, the realm of the public is conditionally opened to women to the extent that women emulate male standards. The effect is that women's participation is tolerated provided it doesn't threaten the *status quo* of masculinist control. The affirmative action provisions of CEDAW confirm this view. Article 4 envisages that 'special' measures may be necessary to accelerate *de facto* equality between men and women, but sees the need for such measures as temporary. This approach implicitly endorses the dominant standard for equality by foreclosing the possibility that women's equality may contest the standard itself. The goal is for women to enter the dominant paradigm, not change it.

The strategy of pluralistic tolerance provides a measure of protection for diversity by recognising a range of minority rights. This strategy sits very uneasily with the category of 'women' which, though clearly not a minority group, is nevertheless treated as such. The awkwardness of the language whereby women attempt to claim access to universal human rights protection illustrates the powerful exclusionary effects of minority status. Phrases such as 'women's human rights', 'women and human rights', even 'the human rights of women', struggle to achieve a satisfactory representation of the problematic relationship between 'women' and 'human rights'.⁴⁷ This problem of language reflects, needless to say, the problem of confronting gendered relations of power.

The problem is further illustrated by the disputed wording of the draft Platform of Action for the Beijing Women's Conference. The draft will be considered by the intergovernmental conference in September with 40% of its wording bracketed, indicating the extent of lack of agreement between states about women's rights.⁴⁸ The high level of disagreement about women's rights is

⁴⁴ UNESCO, 'Backgrounder', above n 2, 2.

⁴⁵ CEDAW, above n 11, arts 7, 8, 10, 11, 12 and 13.

⁴⁶ Joan Williams, 'Deconstructing Gender' (1989) 87 *Michigan Law Review* 797, 798.

⁴⁷ Rebecca Cook, 'Women's International Human Rights Law: The Way Forward' in Cook, above n 13, 3, 10.

⁴⁸ Draft for the Platform for Action, E/CN 6/1995/2/WG/Revs.

ominous. That much of the disagreement is over positions that have been previously agreed to in the context of universal human rights⁴⁹ completely repudiates any claim that women are included in the notion of the universal citizen. 'Women' and 'human' are not interchangeable,⁵⁰ and the idea of tolerance which promotes an approach to difference that does not question the *status quo* helps to maintain this seminal differentiation.

3 *Emancipatory Toleration — Transformation*

Democratic pluralism falls a long way short of the possibilities for change suggested by a third perspective on tolerance. In this view, tolerance could be associated with a radical and transformative democratic tradition, drawing on what Chantal Mouffe describes as 'the composite, heterogeneous, open and ultimately indeterminate character of the democratic tradition'⁵¹ which she sees as distinct from the liberal tradition.⁵² This perspective imagines toleration as a means of encouraging an affirmative vision of indeterminate and localised diversity as a fundamental attribute of an ideal society. It suggests that we can refuse the repressive tolerance and consensus politics that maintain masculinist Eurocentric domination, that we are capable of doing more than 'managing' prejudice and inequality within disciplinary social science categories.

Emancipatory tolerance would involve replacing the dominant discourse of difference which contains and controls diversity through use of hierarchical and dualistic categories. As Nancie Caraway puts it, '[i]f we are to affirm alternative selves, cultures, and plural identities, we must learn to be skilled at working out democratic *equivalences* of meaning, being and struggle.'⁵³ We need a new language capable of speaking a multiplicity of difference without compromising the incomprehensibilities that have hitherto been silenced. Mouffe describes the test for such a transformative discourse as 'its adequacy in creating links between recognised principles and hitherto unformulated demands. Only if it manages to construct new subject positions can it have a real purchase on people's political identities.'⁵⁴ The question is whether tolerance discourse could effectively do this.

⁴⁹ Much of the bracketed language comes directly from the agreed official declarations and action plans of the 1993 World Conference on Human Rights, the 1994 International Conference on Population and Development and the 1995 World Summit for Social Development. For a discussion of the significant advances made for women at such world conferences, see: Donna Sullivan, 'Women's Human Rights and the 1993 World Conference on Human Rights' (1994) 88 *American Journal of International Law* 152; Nadine Taub, 'International Conference on Population and Development' in American Society of International Law, *Issue papers on World Conferences*, No 1 (1994).

⁵⁰ Charlotte Bunch, 'Feminist Visions of Human Rights in the Twenty-First Century' in Mahoney and Mahoney, above n 21, 967, 971-2.

⁵¹ Chantal Mouffe, 'Radical Democracy: Modern or Postmodern?' in Andrew Ross (ed), *Universal Abandon? The Politics of Postmodernism* (1988) 31, 41.

⁵² *Ibid* 32.

⁵³ Nancie Caraway, 'The Cunning of History: Empire, Identity and Feminist Theory in the Flesh' (1992) 12 *Women and Politics* 1, 13.

⁵⁴ Mouffe, 'Rawls: Political Philosophy Without Politics', above n 27, 229.

In practice, the emancipatory potential of the idea of tolerance, to the extent that it exists, is a long way from being realised. Instead the idea of toleration has taken its place alongside other exclusionary and regulatory devices and served to reinforce the dominance of the international *status quo*, which relies on inequalities in power, rather than opening the way towards challenging it. This conceals the real threat to world peace and harmony which is Eurocentric, masculinist world domination.

IV CONCLUSIONS

The inclusion of gender in the official list of differences targeted by the toleration strategy would not, without more, alter the way that gender difference is contained and harnessed to serve the conservative ends of the tolerance agenda. While it is useful to push at the boundaries of pluralist toleration in order to chip away at the universalising and exclusionary standards currently fortified by its strategy, this approach is only capable of limited change that is coextensive with the dominant paradigm. The possibility of reinscribing tolerance as an emancipatory strategy requires a language that can describe and redescribe our multiple social interrelationships and their relations of power. While this is an utterly critical goal, it is doubtful that the heavily encoded idea of tolerance provides a productive site for the pursuit of this endeavour.

TOLERANCE AND HOMOSEX: A POLICY OF CONTROL AND CONTAINMENT

WAYNE MORGAN* AND KRISTEN WALKER†

I INTRODUCTION

The concept of tolerance has many different meanings and uses. As described in the introduction and demonstrated by Dianne Otto in relation to gender, there are three broad approaches to the practice of tolerance: negative, pluralist or emancipatory. In the first section, we demonstrate that the dominant approach to tolerance, as reflected in liberal jurisprudence, is that of negative tolerance. In the later sections we demonstrate that negative tolerance also best describes the practices of international institutions when dealing with lesbian and gay rights. We show the harm which this conception of tolerance inflicts upon lesbians and gay men, and conclude that a project of emancipation requires a jurisprudence free from the subordinating language of tolerance.

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II THE IDEA OF TOLERANCE

In the sense used by the UN in its literature on the Year for Tolerance, tolerance requires a valuing of diversity and a conscious decision that force should not be used to silence those whom we dislike or with whom we disagree, particularly on religious or racial grounds. In its popular sense, too, tolerance generally implies peaceful co-existence in circumstances of disagreement ('live and let live'¹), but not necessarily on the basis of *valuing* diversity. Tolerance is seen as necessary because it promotes freedom and a healthy exchange of views which leads to understanding. It resonates with the ideas of neutrality and objectivity: not working for something, not working against it but supporting its right to exist. In this sense, tolerance is seen as a 'good', a human virtue.

Legal definitions of 'tolerance' are scarce, although those that exist give it a much more limited area of operation than either the UN Year for Tolerance or the popular concept. For example, Lord Scarman in speaking of English common law in 1983 said '[b]ut toleration in a legal sense has only a negative content: it is at best a negative virtue.'² He explained that by this 'negative content' he meant 'not interfering with other people'. He went on to call this 'a fairly low-scale value' and noted that English human rights law ('English legal activity in the field of toleration') imported no positive duties to ensure the protection of the interests of minorities so that they might 'flourish'.³ Similarly, in speaking of the US, Collier states:

Tolerance in the legal sense suggests only a 'thin, procedural concept of justice', one that is familiar in discussions of process-based constitutionalism. So long as the institutions to implement and regulate social and corrective justice meet basic but minimal standards of procedural fairness, legal and constitutional requirements have been met.⁴

It is obvious from the above that the idea of tolerance has no fixed meaning. It is, however, a basic tenet of liberal philosophy.⁵ The promotion of liberty is achieved through the practice of tolerance.⁶ Individual autonomy is maximised under circumstances of 'tolerance' whereby the state and other individuals are prevented from interfering with personal liberty. This notion of liberty is most extensive within a sphere defined as private, although it also places limits on

¹ See Joseph Raz, *The Morality of Freedom* (1990) 143.

² Lord Scarman, 'Toleration and the Law' in S Mendus and D Edwards (eds), *On Toleration* (1987) 49.

³ Ibid 49-50. As examples of this legal activity in the field of toleration, Lord Scarman cited the Sex Discrimination Act of 1975 (Eng) and the Race Relations Act of 1976 (Eng), thus making the link between 'tolerance' and human rights law explicitly.

⁴ Charles Collier 'The Descent of Political Theory and the Limitations of Legal Tolerance' (1994) 44 *Journal of Legal Education* 273, 278 (footnotes omitted).

⁵ Both Raz and Rawls, two prominent liberal theorists, make use of the concept of tolerance in their work: see Raz, above n 1, 143-4, 401-4, 406-7; John Rawls, *A Theory of Justice* (1980) ch 2, ss 34 and 35; indeed, Rawls appears to equate tolerance and 'liberty of conscience': 214.

⁶ Susan Mendus, *Toleration and the Limits of Liberalism* (1989) 3. On the connections between liberalism and tolerance see also Nick Fotion and Gerard Elfstrom, *Toleration* (1992) 124. For an examination of the modern idea of tolerance and its roots in religious conflict, see John Horton (ed), *Liberalism, Multiculturalism and Toleration* (1993).

the interference with such 'public' rights as free speech, expression and freedom of movement. Tolerance promotes liberty in this way by allowing others to maximise their autonomy even when we fundamentally disagree with what they wish to do with that autonomy.⁷ In the context of what might be termed 'classic liberal theory', Joseph Raz states that:

Toleration implies the suppression or containment of an inclination or desire to persecute, harrass [*sic*], harm or react in an unwelcome way to a person. But even this does not yet capture the essence of toleration [A] person is tolerant if and only if he [*sic*] suppresses a desire to cause to another a harm or hurt which he thinks the other deserves.⁸

Thus, inherent in the liberal concept of tolerance is the notion that the object of tolerance *deserves* persecution, but that the tolerator will exercise forbearance and permit the tolerated 'other' to exist. Liberalism values tolerance, despite its acknowledgment that what is tolerated is regarded as deserving of condemnation, because liberalism (or, at least, this brand of liberalism) requires neutrality as to what is 'good'; individual autonomy requires that people be permitted to pursue their own conception of the good; 'even when immoral', people's affairs are 'none of the state's business'.⁹ Thus liberal society may tolerate that which it condemns.

This liberal conception of tolerance is very different from 'tolerance' as envisaged by the UN Year for Tolerance. The liberal notion of tolerance falls squarely within the first approach to tolerance identified above: that of negative tolerance, or containment. 'Tolerance', because of its centrality to liberal discourse, is basic to a number of classic liberal 'rights' — for example, free speech and expression, privacy, freedom of movement, etc.¹⁰ Here, we will focus on some aspects of the right to privacy and its basis in liberal notions of tolerance. We contend that negative tolerance has shaped the development of international human rights law to a substantial degree.

III WHAT'S WRONG WITH TOLERANCE?

While the goals which the United Nations seeks to achieve by proclaiming 1995 the Year for Tolerance are laudable, there are a number of problems in using the concept of tolerance to achieve these ends and promote human rights.

⁷ See Mendus, above n 6, 20: 'the circumstances of toleration are circumstances in which there is diversity coupled with disapproval, dislike, or disgust, and where the tolerator has the power to influence the tolerated.'

⁸ Raz, above n 1, 401-2.

⁹ Ibid 143-4.

¹⁰ The idea of tolerance is often explicitly linked to the whole corpus of human rights law: see, eg, Lord Scarman, above n 2. The Preamble to the United Nations Charter also specifically draws on the concept of tolerance. The Preamble to the General Assembly Resolution proclaiming the Year for Tolerance specifically refers to the Universal Declaration of Human Rights (GA Res 217A, 3 UN GAOR (183rd plen mtg), UN Doc A/RES/217A (1948)), the International Covenant on Civil and Political Rights (Annex to GA Res 2200, 22 UN GAOR (1498th plen mtg), UN Doc A/RES/2200 (1966)) and the 1993 United Nations World Conference on Human Rights: see GA Res 126, 48 UN GAOR (85th plen mtg), UN Doc A/RES/126 (1993). See also Mendus, above n 6.

One problem with 'tolerance' is that, too often, it is the rhetoric rather than the reality. The notion can be used by those who harbour prejudice in order to contain the claims to equality made by subordinate groups.¹¹ More importantly, even when genuinely espoused, tolerance (in its most usual form, negative tolerance) prevents the proper 'recognition and appreciation of others'.¹²

First, the notion of tolerance implies hierarchy (the 'better' tolerates the 'less good'). Do we ever hear of society's tolerance of heterosexuality? Or that refugees should tolerate the receiving population? The very use of the word 'tolerance' sets up a hierarchical binary distinction between the norm and the 'other', inevitably assuming that the 'other' which is tolerated has negative aspects which must be endured.¹³ Within such a discourse, those who are (merely) tolerated can never be equally valued with those who tolerate. The battle for autonomy is lost before we begin. Thus, rather than embracing difference as a positive concept or contribution to society, the liberal doctrine of tolerance sees difference as a negative.¹⁴

Secondly, as noted above, tolerance implies minimal legal protection of the rights of those who are (merely) tolerated. In the context of gay and lesbian rights in international law, this is seen in the fact that 'privacy' rather than 'equality' predominates in the discourse of law-makers.¹⁵ Thirdly, the notion of tolerance supports the false impression that decision-makers are neutral and do not need to accept responsibility for the morality their decisions enforce. In classic liberal philosophy, people should be able to pursue their own goals and the state is required to be neutral as to 'competing conceptions of the good'.¹⁶ Thus liberals believe that it is possible to tolerate that which is abhorred without endorsing the ideas or practices that are tolerated, by remaining neutral about the object of toleration. Yet, this neutrality is feigned because, as pointed out above, tolerance constructs that which is tolerated as negative.

Finally, the notion of tolerance helps to legitimate the *status quo*. It does this by refusing to challenge accepted hierarchies: 'other' voices are rendered powerless because they are not equally valued, they are merely tolerated.¹⁷ In this way, 'tolerance' is one of the discursive mechanisms which is produced by and reinforces the subordination and demonisation of difference. It does this not

¹¹ This is expanded on below with respect to gay and lesbian rights, and a similar pattern is traced in relation to gender: see above.

¹² GA Res 126, 48 UN GAOR (85th plen mtg), UN Doc A/Res/126 (1993), Preamble, para 5.

¹³ Mendus, above n 6, 20, comments that tolerance operates in circumstances of 'dislike, disgust or disapproval' of the other. There has been some debate over whether the idea of tolerance necessarily involves contempt and disgust. Many theorists conclude that such notions are inherent: see, eg, Mendus, above n 6, 129-30.

¹⁴ There have been attempts to rehabilitate the notion of tolerance in a way which values diversity see, eg, Mendus, above n 6. See also our conclusions, below.

¹⁵ See below.

¹⁶ Mendus, above n 6, 79-80.

¹⁷ With respect to toleration of cultural and religious diversity, Chaplin argues 'liberal political theory can find coherent grounds for tolerating only those cultural and religious communities which approximate to the characteristics of the liberal cultural community': see Jonathan Chaplin, 'How Much Cultural and Religious Pluralism can Liberalism Tolerate' in Horton, above n 6, 48.

only by reproducing hierarchies which devalue others but also by delegitimising claims (both legal and popular) to full respect: tolerance grants *some* rights, and this minimal protection is supposed to satisfy the rights-claims made.¹⁸ Demands for *more rights* are then characterised as demands for 'special rights' and thus as illegitimate.¹⁹

These various ways in which tolerance actively harms those who are tolerated stem, in the case of lesbians and gay men, from an underlying need to contain what is viewed as a threat posed to a society structured around and premised on the superiority of the heterosexual norm. Sexuality is seen as a site of danger: if the 'other' is not constructed as negative, it may undermine institutional structures such as 'the family' and the military, and so unravel the very fabric of society. Thus tolerance is used as a mechanism of containment. It is portrayed as beneficial to the tolerated object, but in fact the language of tolerance is the language of subordination; it reinforces the subordination already experienced by those it claims to protect.²⁰

Traditionally, international human rights law has been complicitously silent regarding the abuses suffered worldwide by gay men and lesbians. But there is a fast-growing body of international 'texts' (reports, debates, decisions and declarations) which deal with various aspects of the lives of gay men and, to a lesser extent, lesbians.²¹ Tolerance is, undoubtedly, the ideological centre of international law on gay and lesbian rights, and the way it has shaped that law is illuminating. Our examination of these international texts demonstrates that 'tolerance', as used in these texts, is restricted to a conception of negative tolerance or containment. This conception of tolerance has been used to limit the 'rights' granted to lesbians and gay men.

IV TOLERANCE, SEXUALITY AND EUROPEAN INSTITUTIONS

1 *The European Convention for the Protection of Human Rights and Fundamental Freedoms*

The earliest attempts by gay men and lesbians to utilise international human rights law occurred in Europe, under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).²² In cases concern-

¹⁸ This is illustrated below.

¹⁹ Battles in the US over anti-discrimination protection for lesbians and gay men are often characterised by homophobic opponents as attempts to win 'special rights': see eg Donna Minkowitz, 'Ground Zero: Fear and Renewal in Colorado', *Village Voice*, 19 January 1993.

²⁰ For a striking example of tolerance as containment of threat in the US domestic context, see Arthur Murphy and John Ellington, 'Homosexuality and the Law: Tolerance and Containment II' (1993) 97 *Dickenson Law Review* 693; Arthur Murphy, Leslie Macrae and William Woodruff, 'Gays in the Military: What About Morality, Ethics, Character and Honour?' (1995) 99 *Dickenson Law Review* 332.

²¹ As occurs in many discourses, when law engages with 'homosexuality' it assumes maleness, thus erasing lesbians from view yet still rendering us 'other': see Ruthann Robson, *Lesbian (Out)Law* (1992) especially ch 3.

²² The ECHR (213 UNTS 221 (1950)) is a general human rights convention to which most European states are parties, but it is separate from the European Union. The ECHR is administered by the

ing the criminalisation of homosexual,²³ gay men have been successful in challenging criminal laws under the right to privacy, protected by Article 8 of the Convention. But, although the European Court of Human Rights has accepted that homosexual is protected as a matter of privacy, it has refused to address the protection of gay and lesbian rights under the equality provisions of the ECHR.²⁴ Further, the European Commission of Human Rights has denied that same-sex relationships enjoy the protection of the right to respect for family life. Challenges to discriminatory age of consent laws have also failed. We will analyse the role tolerance has played in the jurisprudence of these three areas.

(a) *Privacy in the European Jurisprudence*

Ideas of tolerance and ideas of 'privacy' track one another closely in the sphere of sexuality; indeed tolerance and privacy, in the context of gay and lesbian rights, are interdependent because lesbian and gay sexual activity, as the abhorred 'other' in the sexual hierarchy, is only tolerated if it is unseen. Both privacy and tolerance, as interlinked strategies, are used as devices to limit gay and lesbian equality. Homosexual is tolerated as long as it remains private and hence unable to destabilise the established categories, like heterosexual and gender, around which society is structured.

*Dudgeon v United Kingdom*²⁵ provides a useful example of the European Court's use of privacy and tolerance in the area of gay and lesbian rights. The case concerned the question of whether Northern Ireland's 'anti-sodomy' laws violated the ECHR. Ultimately, the Court found that the laws violated Article 8 of the ECHR, on the basis that they interfered with the private life of the applicant, but the Court permitted the criminalisation of homosexual involving persons under 21 years of age. The majority judgment granted the minimum possible legitimacy to gay and lesbian rights. The discussion of homosexual in the judgment reinforces the hierarchy inherent in the hetero/homo binary. While gay men (in this case) are to be accorded at least minimum rights, the Court made it clear that 'homosexuality' is not to be regarded as morally acceptable, and the notion of 'tolerance' is one device by which the judgment reproduces the hierarchy and sends the clear message that lesbian and gay identities are not 'as good as' heterosexual identities.

European Commission for Human Rights and the European Court of Human Rights. Complaints about violations of the ECHR go first to the Commission, which may resolve the complaint or ask the Court to resolve it: see Arthur Robertson and John Merrills, *Human Rights in the World: An Introduction to the Study of the International Protection of Human Rights* (3rd ed, 1989) ch 4.

²³ We use the term 'homosexual' to denote same-sex sexual activity and 'heterosexual' to denote 'opposite sex' sexual activity. We do not use the term 'homosexuality' except in quotes because this term is a product of the very discourses that have rendered lesbians and gay men 'other'.

²⁴ The ECHR does not contain an 'autonomous' equality right. Its right to non-discrimination may only be invoked in conjunction with another right or freedom laid down in the ECHR. However, the European Court's interpretation of the equality right has virtually made it an autonomous right which could be used as a basis for protecting lesbian and gay rights: see Pieter Van Dijk, 'The Treatment of Homosexuals Under the European Convention on Human Rights' in Kees Waaldijk and Andrew Clapham (eds), *Homosexuality: A European Community Issue* (1993) 179, 193-200.

²⁵ (1981) 4 EHRR 149.

The role played by the concept of tolerance in the majority's judgment is harmful because it allows the majority to reinforce existing hierarchies of value (the morality of heterosexual and the immorality of homosexual) whilst maintaining a veneer of neutrality which supposedly values diverse identities equally. The majority stated that it was 'not concerned with making any value-judgement as to the morality of homosexual relations between adult males'²⁶ and went on to emphasise that "'decriminalisation" does not imply approval, and a fear that some sectors of the population might draw misguided conclusions in this respect from reform of the legislation does not afford a good ground for maintaining it in force'.²⁷ Thus, 'tolerance' of gay men allows decision-makers to hide behind a false neutrality: they do not have to damage existing hierarchies by expressly pronouncing the equal validity of gay and lesbian identities. Tolerance, combined with privacy (read 'invisibility') allows the majority to avoid taking sides — they can 'tolerate' even if they don't approve, as they permit only minimal rights of privacy which contain the 'gay threat' and keep homosexual largely invisible. Through this mechanism the current privileging of heterosexual is maintained, while gay men and lesbians are co-opted into the system by a rhetoric that pretends to protect their human rights.

The dissenting opinions in *Dudgeon* provide even clearer examples of the way in which the notion of tolerance is used to deny lesbians and gay men basic human dignity and respect. Judge Walsh, for example, distinguished between 'curable' and 'incurable homosexuals', using a common metaphor of 'homosexuality' as illness. He then pronounced:

So far as the incurable category is concerned, the activities must be regarded as abnormalities or even as handicaps and treated with the compassion and *tolerance* which is required to prevent those persons from being victimised in respect of tendencies over which they have no control and for which they are not personally responsible. However, other considerations are raised when these tendencies are translated into activities.²⁸

This is a classic example of the damage done by the idea of tolerance: tolerance is associated with pity for the diseased, but also inherent in this passage is the notion of homosexual as a danger which must be contained — 'we can tolerate their tendencies, but not their activities'. In a similar vein, Judge Matscher stated that Article 8 'by no means requires any society ... to consider homosexuality — however it is manifested — as a variant equivalent to heterosexuality'.²⁹

The concurring opinion of Judge Matscher in *Modinos v Cyprus*,³⁰ also a case concerning anti-sodomy laws and brought under the right to privacy, provides another illustration of the perception that homosexual is a threat which must be

²⁶ Ibid 165.

²⁷ Ibid 168.

²⁸ Ibid 183 (emphasis added).

²⁹ Ibid 174.

³⁰ (1993) 16 EHRR 485.

guarded against. Judge Matscher held that Article 8 of the ECHR is infringed where the law makes it a criminal offence for consenting adults to commit 'homosexual acts' in private — but he excluded from that rule 'a number of specific situations, for instance, the abuse of a relationship in which one party is dependent on the other or carrying out such acts within a closed community, such as a boarding school or a barracks'.³¹ Again, we see a clear message of the threat of homosex: institutions on which society is based, 'public' institutions such as schools and the military, must be protected from the 'threat'. Thus, even in private, homosex will only be tolerated so far (indeed, not very far at all...). This demonstrates once again that negative tolerance, as practised by the European human rights institutions, is antithetical to the fundamental notions of the inherent dignity of all persons and respect for diversity which the UN Year for Tolerance seeks to promote.

(b) Homosex and Respect for Family Life in the European Jurisprudence

The European human rights institutions, while prepared to tolerate private homosex, have not been willing to take lesbian and gay rights any further. Cases based on the right to respect for family life (Article 8) have been unsuccessful because, according to the Commission,

despite the modern evolution of attitudes towards homosexuality [read 'tolerance'], the Commission finds that the applicants' [gay] relationship does not fall within the scope of the right to respect for family life ensured by Art 8.³²

The paucity of reasoning does not disguise the presence of the hierarchical hetero/homo binary which underpins so much of the debate around gay and lesbian rights. This hierarchical binary theme (hetero is normal and good, while homo is its inferior other) is repeated again and again in the European jurisprudence. Thus a lesbian couple with a child were not a 'family' for the purposes of Article 8 of the ECHR, and so were not protected against being separated by discriminatory immigration laws, although a heterosexual couple in the same position would be protected.³³ The 'threat' of homosex to an institution so central to the liberal state, 'the family', is such that lesbians and gay men cannot be permitted to be brought within such an institution, which relies for its very definition on the exclusion of the 'other'. Again, the message is that although gay men and lesbians will be tolerated, we will not be included or valued. Negative tolerance and exclusion are perfectly compatible, indeed, interdependent.

³¹ Ibid 496.

³² Application 9369/81, *X and Y v United Kingdom* (1983) 32 DR 220, 221; Application 11716/85, *S v United Kingdom* (1986) 47 DR 274, 277-8; cited in Van Dijk, above n24, 189-90.

³³ *X and Y v United Kingdom*, unpublished, discussed in Van Dijk, above n24, 189-90.

(c) Age of Consent for Homosex and the European Jurisprudence

The age of consent issue provides another example of denial of lesbian and gay rights, despite the practise of ‘tolerance’. A number of European states provide for 21 as the age of consent for gay men, significantly higher than that mandated for heterosex (generally 16), but gay men affected by this discrimination have not been protected by the right to privacy. So, for example, in *X v United Kingdom*,³⁴ the Commission held that the higher age of consent did amount to interference in X’s private life, but that this interference was justified as being necessary in a democratic society for the protection of the rights of others.³⁵ What kind of democracy is this? Which ‘others’ are being protected? The Commission took the view that

there is a realistic basis for the ... submission that, given the controversial and sensitive nature of the question involved, young men in the eighteen to twenty-one age bracket who are involved in homosexual relationships would be subject to substantial social pressures which could be harmful to their psychological development.³⁶

This approach was also adopted by the Court in *Dudgeon v United Kingdom*³⁷ where, after noting that ‘two hallmarks of [a democratic society] are tolerance and broadmindedness’,³⁸ the Court went on to find that the criminalisation of homosex involving persons under the age of 21 was justified as necessary in a democratic society for the protection of the rights of others.³⁹

The fact that the privacy right has proved incapable of providing a basis on which to attack discriminatory age of consent provisions once again shows the hierarchy inherent in the hetero/homo binary. Homosex is tolerated, but only to a point — it remains a threat to its other, heterosex. In particular, children (interpreted as those under 21, although other indicia of adulthood, such as the right to vote, drive, drink and engage in heterosex come considerably earlier) must be specially protected from this threat. The mere perception of threat indicates the deep-seated antipathy towards homosex — the underlying view being that ‘homosexuality’ is ‘bad’ and that people must be protected from being ‘turned into’ lesbians or gay men. This is what underpins the notion of tolerance — that what is being tolerated is negative, less worthy than the norm, those doing the tolerating. Tolerance does not accept that being gay or lesbian is ‘good’, or even neutral or ‘as good as’ being heterosexual. If we truly accorded respect for human dignity to lesbians and gay men, as human rights philosophy, human rights treaties and the UN documents on tolerance theoretically insist we must, then we must embrace and value a diversity of sexualities, not simply tolerate the existence of other practices in private. And if we take this approach,

³⁴ Application 7215/75 European Commission of Human Rights, November 1982.

³⁵ *Ibid* 78, para 156

³⁶ *Ibid* 78, para 154

³⁷ (1981) 4 EHRR 149.

³⁸ *Ibid* 165.

³⁹ *Ibid* 168.

then why does it matter how people become lesbian or gay? Why does it matter that a man defines himself as gay because he had a consensual sexual relationship with another boy when they were both aged 16, rather than because he was born that way? It only matters because homosexual, although (barely) tolerated, is not seen as a valid identity, worthy of valuing and embracing, but as something which people must be protected against.

Thus we would argue that the notion of tolerance underpins a human rights system which sees the maintenance of discriminatory age of consent provisions as legitimate, indeed *necessary*, because such provisions reinforce society's perception of gay men and lesbians as less than equal and protect society from the 'danger' of homosexual. Tolerance also supports a society structured in such a way as to completely deny lesbians and gay men participation in one of its central institutions, the 'family'. So although human rights and the Year for Tolerance are, nominally, about the inherent dignity of all people, which necessitates valuing diversity, the concept of tolerance in fact legitimates arriving at precisely the opposite outcome. The differential age of consent provisions, and the exclusion of gay men and lesbians from the concept of 'family', are two sites where these consequences of tolerance are clearly demonstrated.

2 *The European Parliament and Pluralist Tolerance*

The analysis of the jurisprudence of the European Court and Commission paints a bleak picture of the practice of tolerance by those institutions: 'tolerance', as it operates within these institutions, is entirely a negative concept, used to contain and control homosexuality. However, that is not to say that the entire European landscape is as bleak. Recently, the European Parliament, an institution of the European Union (EU), passed a resolution on equal rights for gay men and lesbians which goes beyond the parameters of negative tolerance and actually offers something more positive to lesbians and gay men.⁴⁰ In addition to addressing the issue of criminalisation of homosexual, the resolution calls for an end to discriminatory age of consent provisions, an end to discrimination in social security law and other social regulation such as marriage, adoption, housing and inheritance and calls for positive campaigns to combat violence and discrimination against lesbians and gay men and for adequate funding for gay and lesbian organisations.⁴¹ This resolution thus seeks to treat gay men and lesbians as valued members of society, rather than denying us status (as families) and benefits on the basis that we are inferior to the norm. The resolution can be classified as 'pluralist tolerance' — that is, tolerance

⁴⁰ Resolution on Equal Rights for Homosexuals and Lesbians in the European Community, OJ 1994 C 61/40, Resolution no A3-0028/94, 8 February 1994; reprinted in (1994) 2 *ILGA Bulletin* 22-3.

⁴¹ In addition, the resolution seeks specifically the repeal of the United Kingdom law which prohibits 'propagation' or 'promotion' of homosexuality by any body in receipt of government funds (such as libraries, schools and local councils) and thus restricts freedom of expression for lesbians and gay men regarding their sexuality.

which permits some protection for gay men and lesbians from human rights violations and allows us a voice, but which does this within the existing liberal paradigm: existing liberal structures and institutions are to be opened up to lesbians and gay men, but there is no real contesting of existing power structures. Although the removal of barriers to adoption and marriage is radical in one sense, and values gay men and lesbians without constructing us as unsuitable as parents or families, this valuing remains limited to couples: lesbians and gay men who 'fit in' to existing modes of behaviour, who approximate the heterosexual model, will be embraced, but valuing of greater diversity is not evident.

In any event, the aspirations of the resolution are unlikely to be achieved in the near future. The European Parliament is, of all the institutions of the EU, the least powerful. It is a political forum, without any decision-making or enforcement powers. All it is able to do is to call for member states to take action. If the member states fail to do so, there is no avenue of redress, no mechanism whereby individuals or the Parliament itself can require compliance with the resolution. Thus, the only site at which we see a measure of tolerance emerging which may positively benefit lesbians and gay men is a site without significant power, a body which can do little more than make 'gay-friendly' statements.

V TOLERANCE, SEXUALITY AND THE UN

It is only in the last decade that any UN agency has dealt with gay and lesbian issues. When those dealings are examined, they reveal a suspicion and lack of understanding which could hardly be said to demonstrate tolerance as described in the UNESCO documents. Often, myths concerning 'homosexuality' and the need to contain its spread are reproduced in the course of these dealings.

The first official mention of 'homosexual' rights occurred within ECOSOC. Heinze notes that the term 'sexual minority' entered

United Nations human rights discourse within the Sub-Commission working group on Slavery and Slavery-like Practices, in the (not entirely appropriate) context of a discussion on prostitution A subsequent report on the theme, referring particularly to homosexuals and transsexuals, was submitted by J Fernand-Laurent in 1988 .. *Although well meaning, this report failed to address the question of fundamental rights of sexual minorities.* Indeed, suffering a pervasive lack of historical and social-scientific perspective, it would have been unable to do so, or to provide any framework for understanding rights of sexual orientation. This may be one reason why it has been ignored, and why recognition of rights for sexual minorities has since had little success within the United Nations.⁴²

The emphasised words could be used as a summary of UN practice on gay and lesbian rights. This failure is intimately connected with the idea of tolerance: because gay men and lesbians are merely tolerated (because we are a threat), our

⁴² Eric Heinze, *Sexual Orientation: A Human Right* (1995) 12, n 55 (emphasis added).

recognition must be on limited terms which 'contains' the perceived threat. As in the context of European protection of the human rights of lesbians and gay men, fundamental questions of equality are not addressed, but are sidestepped by protecting gay and lesbian rights (if they are protected at all) on limited grounds such as 'privacy'. Notions of tolerance, threat and containment echo throughout what little UN practice exists. It is particularly evident in the battles within ECOSOC over the accreditation of the International Lesbian & Gay Association (ILGA)⁴³ as a non-governmental organisation (NGO) and its echoes were heard at the 1993 United Nations World Conference on Human Rights. The way 'privacy' is used to limit gay and lesbian rights is also evident in the UN Human Rights Committee's decision in the Toonen case (just as it is in the decisions of the European Court of Human Rights). Here, we examine these three sites of conflict to illustrate the function which 'tolerance' performs in UN discourse about lesbian and gay rights.

1 *ILGA's battles over NGO status*

In July 1993, ILGA was granted NGO status by ECOSOC. The accreditation system is one whereby ECOSOC gives permission to various NGOs (through its NGO Committee) to participate in the human rights work of the UN.⁴⁴ ILGA had been seeking accreditation since 1991 and its application was controversial. In the NGO Committee, the controversy forced the Committee to depart from its practice of consensus decision-making and put ILGA's application to a vote.⁴⁵ By a majority, the Committee recommended acceptance of ILGA's application and this recommendation went forward to ECOSOC. When ECOSOC voted, after heated debate, the vote was 22-4 in favour of accepting ILGA's application.⁴⁶ Unfortunately, this victory was to be short-lived.

In September 1993, an anti-gay magazine in the USA, ran a story that the UN had been infiltrated by paedophiles because of ILGA's accreditation. This claim was based on the fact that one of the domestic groups affiliated with ILGA (which acts as an umbrella organisation) was the North American Man-Boy Love Association (NAMBLA). Senator Jesse Helms, known for his homophobia, started questioning why the US had supported ILGA. The US then threat-

⁴³ ILGA is an umbrella organisation, whose members include gay and lesbian groups from around the world. It operates as an advocacy and research group for gay and lesbian rights at an international level.

⁴⁴ See Dianne Otto, 'Non-Government Organisations in the United Nations System: The Emerging Role of International Civil Society', *Human Rights Quarterly* (forthcoming).

⁴⁵ A vote was also taken on an application by Human Rights Watch, in the face of opposition to that group because of criticisms it had made of the human rights record of some states. On ILGA, nine states voted in favour, four against, three abstained and three were not present. Sudan was the most vocal opponent: see ILGA Media Release, 'Out at the UN: UN Accredits the International Lesbian and Gay Association', 31 August 1993.

⁴⁶ In discussion, Syria moved that ILGA be rejected, stating that it spoke on behalf of the Group of 77. Malaysia also objected. Australia, Canada and the UK were the strongest supporters. Those states voting no were: Syria, Malaysia, Swaziland and Togo. China, Colombia, India and Nigeria abstained. Morocco announced it was 'absent'. States voting in favour of ILGA included 'western' states, states from Eastern Europe and states from Latin America: *ibid.*

ened to 'change its vote' unless ILGA expelled all affiliates associated with paedophilia. ILGA diligently set this process in motion. Despite ILGA's actions, however, in January 1994 the US Senate voted unanimously to withhold \$129 million from the UN if it continued to support ILGA. In June 1994, NAMBLA was expelled at ILGA's annual conference. Nonetheless, in September the US brokered a deal within ECOSOC for ILGA's expulsion, claiming not to be convinced that ILGA had expelled all groups which 'condoned' paedophilia.⁴⁷

That ILGA was expelled on the basis of views it did not espouse, at the instigation of homophobic groups, says much about the practice of 'tolerance' by UN bodies. This example, at least, seems to be in stark contradiction to the General Assembly's description of tolerance as the recognition and appreciation of others, the ability to live together and to listen to others. Given that ILGA was expelled — despite the demonstrable violations of the rights of lesbians and gay men which occur worldwide — we can only conclude that these violations are regarded by the members of ECOSOC as trivial; their tolerance does not extend that far. What is more, the link between paedophilia and homosex is a demonstrable myth. The defining characteristic of most paedophilia is masculinity, not 'homosexuality': most perpetrators of child abuse identify as heterosexual men and their victims are predominantly female.⁴⁸ The presence of this myth at the site of this attempted intervention by a gay and lesbian NGO into powerful institutional discourses reinforces the discourse of 'homosexuality' as a threat which needs containment.⁴⁹ ILGA is the only group to be 'removed' from the UN's list of NGOs since the 1950s;⁵⁰ by extension, this says that gay and lesbian rights are not worthy of protection or tolerance by the major human rights body in the UN system.

2 *The UN World Conference on Human Rights 1993 (the Vienna Conference)*

In June 1993, three lesbian and gay organisations were accredited to the Vienna Conference. These were ILGA, the Australian Council for Gay and Lesbian Rights (ACGLR) and the Canadian group Equality for Gays and Lesbians Everywhere (EGALE). This was the first time any such group has been accredited to a UN conference or forum. Representatives from these organisations addressed the Main Committee a number of times. They encountered resistance to being allocated time to speak; the Chair of the Main Committee, Madam Halima Warzazi of Morocco, stated that she had difficulty saying the words 'lesbian' and 'gay' and that the gay and lesbian groups were lucky she did not express her own views to the Main Committee.⁵¹

⁴⁷ See Otto, above n 44.

⁴⁸ Richard Posner, *Sex and Reason* (1992) 399-400, and sources cited therein.

⁴⁹ This pattern is also evident in European battles concerning age of consent laws: see above.

⁵⁰ The UK and US had four groups expelled over criticism of the war in Korea: see Otto above n 44.

⁵¹ See Report of the ILGA Committee, *The Start of a Process: The International Lesbian and Gay Association at the United Nations World Conference on Human Rights* (1993) 5. Note, however, that Madam Warzazi's final report to the Plenary did include a positive reference to the human rights of 'sexual minorities'.

Governments at the Conference which specifically spoke in favour of lesbian and gay rights included the Netherlands, Canada, Austria, Australia and Germany. The only government to make a specific negative reference was that of Singapore. Canada put forward a motion on the draft Final Declaration to specifically include 'sexual orientation' in the lists of grounds of discrimination. In response, the list of grounds was removed altogether.⁵² On the whole, the visibility of gay men and lesbians at the Vienna Conference was a positive development. It must be noted however, that this positive development was due almost entirely to gay and lesbian NGOs, not states. This illustrates the fundamental importance of NGOs in achieving the respect for diversity which the Year for Tolerance is designed to promote. Indeed, the refusal to specifically mention lesbian and gay rights, like ILGA's experience with ECOSOC, demonstrate a high degree of intolerance within the UN. Unlike the jurisprudence of the European Court and Human Rights Committee — which at least attains the first level of tolerance identified above, that of negative tolerance or containment — the United Nations has failed to attain even this minimal level.

3 *The Toonen case*

The Toonen case represents the only 'decision' concerning gay and lesbian rights by any UN body. A complaint was lodged by an Australian gay man with the United Nations Human Rights Committee after Australia acceded to the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR).⁵³ This protocol allows individuals' complaints to be taken to the Committee. Mr Toonen alleged that laws criminalising 'unnatural sexual intercourse' in Tasmania violated Australia's obligations to respect his privacy and equality rights.⁵⁴ The Committee, following the lead of the European Court of Human Rights, formed the view that these laws did breach the right to privacy in Article 17 of the ICCPR.⁵⁵ The Committee refused to consider whether they also amounted to a breach of equality rights, despite the fact that the challenged laws were obviously discriminatory.⁵⁶

⁵² See *ibid* 6-7. Paragraph 8 finally reads: 'Respect for human rights and for fundamental freedoms without distinction of any kind is a fundamental rule of international human rights law'.

⁵³ Annex to GA Res 2200, 21 UN GAOR (1498th plen mtg), UN Doc A/Res/2200; UKTS 6 (1977). The Optional Protocol came into force for Australia on 25 December 1991: see *ATS* 1991, No 39. Mr Toonen was the first Australian to send a communication to the Human Rights Committee: see Wayne Morgan, 'Identifying Evil for What it Is: Tasmania, Sexual Perversity and the United Nations' (1994) 19 *MULR* 740. See also Kristen Walker 'The Participation of the Law in the Construction of (Homo)Sexuality' (1994) 12 *Law in Context* 52, 71-2.

⁵⁴ See Morgan, above n 53.

⁵⁵ See *Toonen v Australia*, Views of the UN Human Rights Committee, UN Doc CCPR/C/50/D/488/1992 (1994).

⁵⁶ One member of the Committee, Mr Bertil Wennergren, appended a separate opinion in which he stated his views that the Tasmanian laws did amount to a breach of the equality provisions of the ICCPR: *ibid*. The majority's refusal to declare these laws a breach of the right to equality is even less defensible than the similar refusal by the European Court of Human Rights (discussed above), given that the ICCPR contains an autonomous equality right, while the ECHR does not.

The Committee's decision largely avoids the subordinating language of tolerance, yet its basis in 'privacy' is a method of containment. It is a device to limit gay and lesbian rights, to contain the threat posed by homosexual, in the same way as the decisions of the European Court of Human Rights discussed above. Laws which are clearly discriminatory should be declared to be so, but it seems that international tolerance does not extend to the point of recognising that lesbians and gay men are treated unfairly and unequally by such laws.⁵⁷ Once again, because gay men and lesbians are merely tolerated, rather than accepted as valued members of the community, our rights are contained within the minimal protection available under the right to privacy.

Like that of European institutions, the practice of tolerance by the UN in respect of gay men and lesbians demonstrates a strategy of control and containment. This practice falls almost solely within the notion of negative tolerance, if it even extends this far. The UN controversy surrounding ILGA illustrates that much of UN practice is still highly *intolerant*. This intolerance reinforces the silence enveloping gay and lesbian rights (lesbian rights even more so). When tolerance is practised, it seldom even achieves the level of pluralist tolerance. It certainly falls far short of emancipatory tolerance.

VI CONCLUSIONS

Tolerance, in its liberal manifestation, means simply negative tolerance: tolerance which contains gay men and lesbians, in a variety of ways. This negative form of tolerance is not what is envisaged by the UN documents on the Year for Tolerance. but it is certainly the form of tolerance which underlies human rights law as applied to lesbians and gay men. As a result, gay men and lesbians continue to be subordinated and the language of tolerance, rather than protecting gay men and lesbians, reinforces that subordination. The United Nations vision of tolerance could offer more to gay men and lesbians, but the documentation indicates that the United Nations does not 'see' lesbians and gay men; it does not envisage us as being within its broader view of tolerance, which speaks of diversity as 'enriching our world'. The United Nations is focusing on one specific series of problems: racial and ethnic intolerance and violence, the 'public' face of intolerance that may (and does) lead to conflicts between states. 'Private' intolerance, such as intolerance inflicted by a state on its gay and lesbian citizens, or by non-state actors against gay men and lesbians, is not seen as important because of its private nature. Intolerance in the form of homophobia and heterosexism will not lead to armed conflict, therefore the United Nations need not concern itself with these things. And, although lesbians and gay men are tolerated under international human rights law, the tolerance we receive (and which it is implied we deserve) is negative tolerance, containment, not pluralist or emancipatory tolerance. For gay men and lesbians,

⁵⁷ The Committee did, in passing, state that the 'status' grounds on which discrimination is prohibited under the ICCPR include sexual orientation: *ibid* para 8.7. This finding has great potential for future development.

then, the Year for Tolerance is a non-event; and the tolerance we are accorded elsewhere simply continues our subordination, rather than valuing us. We want to be valued *for* who we are, not tolerated *despite* who we are.

The valuing of lesbians and gay men *for* who we are requires, at the very least, re-imagining tolerance in its emancipatory sense. Yet such a re-imagining seems an almost impossible project. As we have demonstrated, hierarchical devaluing is inherent in the concept of tolerance as it is practised and theorised in liberal jurisprudence. Simply adding gay men and lesbians to the list of those to be tolerated would do nothing to challenge these hierarchies. To achieve an emancipatory strategy we need a language free from hierarchical oppositions. In proclaiming 1995 the Year for Tolerance, UN institutions attempted to encourage a positive approach to (some) differences, but without contesting current power inequalities. A positive approach to difference necessitates greater participatory democracy, in the sense of redistribution of power and wealth, and a broader conception of which entities form part of international civil society. If this is what the Year for Tolerance was designed to achieve, then the UNESCO materials relating to it should have been phrased in a language of diversity rather than the language of 'tolerance'. We need a jurisprudence which is genuinely inclusive of diversity. If international practice was based on such a jurisprudence, we would have no need of a concept of 'tolerance'.