

LIBERALISM AND HATE LAWS: TOLERATION VERSUS TOLERANCE

Attempts to create interpersonal tolerance undermine state toleration, writes **John Shellard**

There is a key difference between conflicts that stem from religious beliefs and those that have roots in other types of identities or interests. Religious beliefs operate on the fundamental level of conceptions of ‘the good.’ Though in Australia the conflicts between organised religions are a minority issue, at least at present, the way in which such conflicts are resolved serves as a template, a framework, to deal with all conflicts on the level of conceptions of the good life.

Religious vilification laws impose penalties for encouraging hatred, contempt or ridicule of others based on their religious beliefs. In the Spring 2008 issue of *Policy* Steve Edwards highlighted some of the difficulties that arise from banning the vilification of people on the basis of religious beliefs or practices. He argued that the narrow scope of such laws seemed primarily to protect Islam and appeared to ignore the broader problem of racial, ethnic or economic vilification without good reason. He proposed that if the threat to tolerance from vilifying speech is as extreme as the arguments given by those who support such laws suggest, there is good reason to go beyond the religious clauses of such legislation and prohibit ‘all statements that are deemed to incite “hatred,” “contempt,” or “ridicule” against anyone, for any reason, with no unprincipled exemptions whatsoever.’¹ To only ban religious hate speech is ‘logically incoherent and hypocritical.’² He, like many others, sees ‘religious hatred laws’ as fundamentally anti-liberal and repressive.

Though Edwards had many valid criticisms of ‘religious hatred laws,’ I want to agree with him only in part by suggesting that anti-vilification legislation represents an understandable, though misguided, attempt to value and advance the liberal principle of tolerance. The problem is not the goal, which is worthy, but rather that the method of using ‘hate laws’ is counter-productive and likely to encourage intolerance, as Edwards rightly points out. In this paper I argue that this reliance on the law stems from confusion about toleration—specifically a failure to distinguish between toleration and tolerance.

Tolerance versus toleration

In his article ‘Religious Tolerance—The Pacemaker for Cultural Rights,’ Jürgen Habermas makes a distinction between ‘tolerance’ and ‘toleration’:

‘[T]olerance’ as a form of behaviour is distinguished from ‘toleration’, the legal act with which a government grants more or less unrestricted permission to practice one’s own particular religion.³

John Shellard is currently a PhD candidate at the ANU in the field of moral and political philosophy. His thesis looks at the problems of religious toleration and blasphemy in Australia.

Endnotes for this essay can be found at www.policymagazine.com.

The difference may seem at first glance to be splitting linguistic hairs, but it provides a very useful tool for illuminating the current debate over religious vilification legislation. The distinction highlights the fact that ‘the problem of intolerance’ is in fact two distinct problems. The first relates to what Habermas identifies as ‘tolerance’—that of people of different religious beliefs being tolerant of one another. I refer to this as *interpersonal tolerance*. The second is ‘toleration’ or *state toleration*: state-granted freedom to act on religious conviction or follow whatever conception of the ‘good life’ an individual might hold. It is the problem of *interpersonal intolerance* that anti-vilification legislation tries to solve. Whereas what Philip Pettit and some other writers have referred to as a republican notion of freedom, emphasising non-interference, would focus primarily on *state toleration*.⁴ The liberal tradition has historically upheld both toleration and tolerance: and herein lies the problem.

The history of attempts to solve these problems helps to explain why current attempts to use legislation to solve the problem of *interpersonal intolerance* have been unwittingly at the expense of *state toleration*. This is because the state can either be restrained from interfering in conflict or be tasked with the role of solving it—but not both simultaneously.

State toleration

The liberal tradition has historically focused first on the problem in terms of *state toleration*. It sought to establish institutions that allow, or guarantee, an individual freedom to practise their religion without the interference of the state. Australia is no exception here. Section 116 of the Constitution of the Commonwealth of Australia states:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.⁵

The issue that faced the founding fathers as they drafted these words was not how to ensure

that citizens of the Commonwealth treated each other with respect, or the elimination of discrimination. Joshua Puls describes the climate in Australia around the time of Federation as characterised by:

[A]n ‘anti-sectarian endorsement of religion’. A climate of tolerance prevailed throughout the Australian colonies, based principally on a concern for the advancement of religion generally.⁶

What concerned them was not the privilege or advance of religion *per se* but rather the fear that one religion or denomination would establish itself as the official state religion *or* that the Commonwealth would pass laws that would make the members of a minority group into second class citizens on the basis of religious convictions.⁷ These fears were not irrational because they had a firm precedence in the religious conflicts that devastated Europe in the wake of the Protestant Reformation. These ongoing tensions continued in Britain and especially Ireland between the established Anglican Church and Catholic and non-conformist groups. Even in 1900 there were legitimate fears that sectarianism could dominate a Federated Australia. The principles underpinning the Constitution had a history deeply cognisant of the potential for religious intolerance.

Reformation in Europe was followed by severe conflicts originating from religious disputes. The histories of France or England during the sixteenth and seventeenth centuries are a case in point. In the name of religion, civil war followed civil war, interspersed with massacres and periods of state oppression. The periods of peace, such as that under the Edict of Nantes, could hardly be seen as times of tolerance but merely as times of uneasy truce when both sides were too weak to eliminate their opponents.⁸ The way in which Europe was able to emerge from this perpetual religious conflict is critical to this issue.

This period of great turmoil, violence and upheaval saw, among other things, the development of liberal ideas, arguably the most significant of which was toleration. Jean Hampton has called toleration ‘the substantive heart of liberalism.’⁹ A very influential example of this sort of argument for toleration of religious belief was John Locke’s famous *Letter Concerning Toleration*

of 1689. Locke's ideas were particularly influential in England.

First, Locke disputed the customary claim of those who advocated the suppression of religious diversity on the grounds that diversity of belief produces friction and civil unrest. Locke rejected the idea that diversity is the problem, and he also rejected the use of coercion and force as necessary to bring about a harmonious society. Locke claimed the opposite:

It is not the diversity of opinions, which cannot be avoided; but the refusal to grant toleration to those that are of different opinions, which might have been granted, that has produced all the bustles and wars, that have been in the Christian world, upon the account of religion.¹⁰

Second, he saw the use of state power in support of sectarian aims to be the real issue and the source of violence and unrest. The solution he advocated was a state limited to securing the basic needs of its citizens. So he said, 'The commonwealth seems to me to be a society of men constituted only for the procuring, preserving, and advancing their own civil interests.'¹¹ These civil interests are similar to those considered in Locke's broader political philosophy. The state has powers governing only the protection of 'life, liberty, health, and indolence of body' as well as their possessions and property.¹² Locke's state protects people from violence and injustice but has no authority or place to restrict or determine religious belief or expression unless they directly impinge on the life, liberty or property of others. The state and the churches in his conception are separate. The sphere of the church, or other religious associations, is strictly spiritual: 'The end of the religious society ... is the public worship of God, and by means thereof the acquisition of eternal life.'¹³ The result of this division is that 'the civil government can give no new right to church, nor the church to the civil government.'¹⁴ Under this arrangement, the state and religion operate in separate realms.

The modern liberal tradition has continued this approach to toleration. Though, rather than being expressed in terms of the freedom of individuals to ascribe to whatever religion their

conscience dictates, thinkers such as John Rawls broadened it out to encompass 'conceptions of the good life.' This may or may not be what we would generally consider to be 'religious beliefs.'

Interpersonal tolerance

However, there is a weakness in this arrangement in terms of toleration and tolerance. Locke's arrangement only secures *state toleration* by preventing both the state from interfering in questions of intolerance and religious associations from using state institutions to resolve their conflicts. Under Locke's arrangement, within boundaries set by security of life, liberty and property, citizens are not prevented from making life very hard for one another over issues of religious belief just so long as they do not make use of the state to do so. As a result, only the scope of the conflict is reduced.

State toleration therefore reduces the 'stakes' of religious difference, but it does not eliminate the possibility of social and interpersonal conflict.

State toleration therefore reduces the 'stakes' of religious difference, but it does not eliminate the possibility of social and interpersonal conflict. This tradition is limited as it claims a position of neutrality in relation to different 'conceptions of the good.' Though it is not widespread, there continue to be reports of religious intolerance, tension and conflict in Australia. One example can be seen in the *Ismae: Listen* report undertaken by the Human Rights and Equal Opportunities Commission (HEROC, now AHRC) in 2004. The report was the result of a series of consultations with Arab and Muslim Australians about their perception of the level of prejudice and discrimination in Australian communities. In his foreword to the report William Jonas summarised that:

People reported being fired from their jobs or refused employment or promotion because of their race or religion. Children have been bullied in schoolyards. Women have been stalked, abused, and assaulted in shopping

centres. Private homes, places of worship and schools were vandalised and burned ... Many Arab and Muslim Australians said they were feeling isolated and fearful. 'I don't feel like I belong here anymore' was the common sentiment.¹⁵

These are serious issues that should concern anyone who values a diverse, peaceful and open society. The report suggested that the principles outlined in the Constitution are rather irrelevant when dealing with these issues. They do little more than place some restraints on the actions of government.

People do need to be protected against tyranny—*state intolerance*. However, this is only the first step. John Stuart Mill wrote colourfully that:

[T]he king of the vultures would be no less bent upon preying on the flock than any of the minor harpies, it was indispensable to be in a perpetual attitude of defence against his beak and claws. The aim, therefore, of patriots was to set limits to the power which the ruler should be suffered to exercise over the community; and this limitation was what was meant by liberty.¹⁶

Mill famously pointed out that in a democracy the necessity of restraining tyranny seems to fade away as the ruler becomes the representative of the majority. It does however open up an equal danger, a tyranny of the majority—*interpersonal intolerance*. His position seems in line with those arguing in favour of religious hate laws. Mill argued that:

Protection, therefore, against the tyranny of the magistrate is not enough: there needs protection also against the tyranny of the prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them...¹⁷

A similar sentiment can be seen in the preamble to the *Racial and Religious Toleration Act 2001* in Victoria, an example of the type of law in question. Point 3 of the Preamble states:

Vilifying conduct is contrary to democratic values because of its effect on people ... It diminishes their dignity, sense of self-worth and belonging to the community. It also reduces their ability to contribute to, or fully participate in, all social, political, economic and cultural aspects of society as equals, thus reducing the benefit that diversity brings to the community.¹⁸

The key difference between Mill and the Victorian legislators is not their diagnoses of the problem. Both see the suppression of difference of belief as a bad thing. I argue, in contrast to Edwards, that the motivation for putting in place anti-vilification laws is reasonable, stemming from a desire to reduce or eliminate oppressive religious intolerance within the community. Such a desire is merely one side of the delicate balance of a democratic society. As Steven Lukes puts it, the problem is 'how to procure a just balance between individual freedom, equality, and social solidarity.'¹⁹ Though it has serious complications, such legislation does identify a problem that requires a solution.

The tension between toleration and tolerance

The difference of course between the recent Victorian legislators and Mill is in the type of solution they put forward. The motivation may be reasonable but legislation such as the Victorian Act is self-defeating because it not only fails in its aim to secure *interpersonal tolerance* but, in doing so, risks damaging or abolishing *state toleration*.

State toleration requires the state to be neutral regarding different conceptions of 'the good'—such as those held by religious groups and belief systems. As Will Kymlicka puts it 'the state does not justify its actions on the grounds that some ways of life are intrinsically more valuable than others. The justification of state policy, therefore, is neutral between rival conceptions of the good.'²⁰ In this system the success of a way of life, a belief system or 'conception of the good,' as Kymlicka puts it, has to depend on its attractiveness to its adherents rather than the attitude of the state towards it.

The danger in using such legislation to combat intolerance between groups and shore up equality and social solidarity is that it breaks down the position of neutrality that a liberal state seeks to

hold and, as a result, endangers individual freedoms. Religious hate laws put the state in the position of judge over the appropriateness of an individual's opinions, convictions and beliefs. Such laws entail intervention in the lives of citizens beyond simply protecting 'life, liberty and property.' By enforcing such laws the state is likely to end up aligning with a religious group, or it may discount religion altogether as a legitimate human activity. Dominant church and state become aligned; the state adopts a paternalistic stance in protecting and promoting minority faiths; or secularism becomes a quasi-religious belief promoted by the state.

It follows that those considering the implementation of such laws are faced with a choice: either to use legal and institutional means to uphold *state toleration* or *interpersonal tolerance*. The state is either committed to non-interference in a citizen's beliefs and the tensions that arise from these, or it chooses to step in and become an active participant by taking sides and achieving the outcomes suggested above. In addition, if the critics of anti-vilification are correct, it is very questionable whether legislation can, in any case, achieve equality and social solidarity. There is good reason to oppose the adoption of such laws.

Joint underpinnings

What then are the implications of this analysis of *state toleration* and *interpersonal tolerance*? It is important to point out that those who oppose religious hate laws generally do not oppose the goal of encouraging tolerance. Those who are seeking to secure and encourage a peaceful and harmonious society via such laws are fundamentally seeking the same thing as those who oppose them. A third way or a compromise is needed.

It is also fair to say that both tolerance and toleration ultimately find their origins in the attitudes and values of the nation's citizens, in individuals. In the case of *interpersonal tolerance*, this would seem obvious, but *state toleration* of belief under a democracy also implies a commitment by citizens to value and uphold principles of toleration proposed by constitutions. This suggests pre-emptive social measures that support but are properly outside control of the law.

Tolerance itself, as Susan Mendus pointed out in her Freilich lectures of 2007, is a difficult thing to argue for as an end in itself as it seems paradoxical. In a sense it is true that 'A liberal is someone who can't take his own side of the argument.' To tolerate something the individual must first strongly oppose it and have the means to put a stop to it and yet, for some reason, forbear to do so. From this perspective, it is morally right to allow something to continue that you believe is morally wrong.²¹ What is needed are values on which to base arguments for tolerance.

The motivation for putting in place anti-vilification laws is reasonable, stemming from a desire to reduce or eliminate oppressive religious intolerance.

It would seem that there are things that can underpin both toleration and tolerance and that could be acceptable to the broadest cross section of the community. One would be a notion of reciprocity. An understanding that what is done to others must be acceptable for you, were you in their position. Also, a notion of valuing and respecting individuals 'in and of themselves' could underpin a defence of tolerance. The worth of human beings—citizens—should be valued apart from capacity, identity or interests. Valuing people should be distinguished from valuing a person's culture or beliefs and defended as a cornerstone of a free, democratic society. On the basis of values such as reciprocity and inherent worth of individuals, problems such as blasphemy and offensive speech can be worked out. Finally, we need to consider institutions that will allow for the free and robust debate that reinforces rather than threatens *state toleration*.

These at least are a few possible ways of underpinning both tolerance and toleration at the level of the individual and community. Rather than expending resources supporting or knocking down religious hate legislation, we need to be discussing the values that we agree upon and that can underpin a dynamic, diverse and cohesive national community. This dialogue is best held far away from courtrooms and the threat of legal sanctions.