

ARTICLE

Religious rights and freedom of speech

Baroness Hale of Richmond^{1,2}

¹President of the Supreme Court of the United Kingdom, 2017–2020 and ²Honorary Professor, Faculty of Laws, University College London

Abstract

This article considers the common law offences of blasphemy and blasphemous libel; the development of the Law Commission's recommendations on offences against religion and public worship in 1985 (which ultimately led to the abolition of the offences of blasphemy and blasphemous libel in England and Wales in 2008); and proposals from various international bodies which now argue for similar reform.

Keywords: blasphemy; ECHR; freedom of religion or belief; freedom of speech; Law Commission; offences against religion and public worship; reform

Introduction

The relationship between religious rights and freedom of speech is complicated and emotive, but it is one to which I am proud to have made a small contribution, as the following history will relate.

Gay News was a fortnightly newspaper which ran from 1972 to 1983. In June 1976, it published a poem by Professor James Kirkup, called 'The love that dares to speak its name'. It's not a very good poem but it packs a certain punch. It tells of the passionate love felt for Christ by the Roman centurion who lifted him down from the cross after his crucifixion. It gives a graphic description of homosexual sex acts between the centurion and the dead body. It claims that Christ had had sex with numerous other biblical figures including John the Baptist and all twelve of the Apostles and (even more implausibly Paul of Tarsus). And perhaps most shocking of all, it claims that the risen Christ appeared to the centurion first on the third day. From this brief description it will be apparent that the poem was not questioning the divinity of Christ or his resurrection from the dead, the central tenets of the Christian faith. But it was deeply shocking to many Christians, partly no doubt because of its description of homosexual acts and partly because it alleged that Christ himself was gay.

The editor, Denis Lemon, and the publisher of *Gay News* were prosecuted for the common law offence of blasphemous libel. Blasphemy – the spoken word – and blasphemous libel – the written word – were recognised as offences in secular law in the course of the 17th century (having previously been punished only in the

ecclesiastical courts). Chief Justice Hale (no relation to the author) justified this because the Church of England was established by law and thus 'part and parcel of the laws of England'.¹ During the 19th century, however, it was established that it was not blasphemy to promote atheism or agnosticism or indeed other religions, or even to attack Christianity and the established Church, provided that this was done in a moderate and decent fashion: the textbook definition of blasphemy was publishing 'any contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ, or the Bible or the formularies of the Church of England as by law established'.² Hence it was not unlawful to leave money by will to the National Secular Society, whose main object was 'to promote the principle that human conduct should be based on natural knowledge and not on super-natural belief', because the mere denial of Christianity without scurrility or profanity was not blasphemous.³

By 1976, when the Kirkup poem was published, it was thought that the offence had become obsolete. There had been no prosecution since 1922. The *Gay News* prosecution was brought, not by the state prosecuting authorities, but by Mary Whitehouse, a prominent private citizen who had founded the National Viewers' and Listeners' Association to campaign against bad language on the BBC and was a vocal opponent of the permissive society generally. The trial judge directed the jury that it was sufficient if they took the view that the poem vilified Christ in his life and crucifixion and that the defendants intended to publish it. The prosecution did not have to show that they intended to attack the Christian religion, or to insult or outrage Christian sympathisers or believers, or to provoke a breach of the peace. The jury convicted both defendants by a majority of 10 to 2, so they must have concluded that the poem was blasphemous. The publishers were fined £1000 and the editor was not only fined £500 but given a sentence of nine months imprisonment, suspended for 18 months. The Court of Appeal rejected the defendants' argument that it was necessary to prove an intention to blaspheme and that Denis Lemon should have been allowed to give evidence about his intentions in publishing the poem. But they did quash the suspended sentence.⁴ The House of Lords (then the highest court in the land) also rejected the argument that it was necessary to prove an intention to blaspheme, albeit by a majority of only three to two. Their lordships recognised that the point was not entirely clear and needed clarification. One of the majority, Lord Scarman, who is generally regarded as a liberal-minded judge, commented that 'In an increasingly plural society such as that of modern Britain it is necessary not only to respect the differing religious beliefs, feelings and practices of all but also to protect them from scurrility, vilification, ridicule and contempt'.⁵

¹ *Taylor's Case* (1676) 86 ER 189.

² J Stephen, *A Digest of the Criminal Law*, 6th edn (London, 1904), article 214.

³ *Bowman v Secular Society Ltd* [1917] AC 406.

⁴ *R v Gay News Ltd* [1979] QB 10.

⁵ *Whitehouse v Gay News Ltd* [1979] AC 617, 658.

The Law Commission's proposals for reform

The Law Commission had been set up by statute in 1965 as a public body with a mission to simplify and modernise the law. Among its first tasks was to codify the criminal law. The continued existence of offences defined, not by Parliament, but by judge-made law, was inconsistent with this aim. So the Commission set about reviewing each of them, including blasphemy. In 1981, nearly two years after the House of Lords' decision in the *Gay News* case, the Commission published a Working Paper on *Offences against Religion and Public Worship*.⁶ Its members then were Mr Justice Kerr (the chairman), Dr Stephen Cretney (an academic), Stephen Edell (a solicitor), William Forbes QC, and Dr Peter North (another academic). The premise of the paper was that the common law offences of blasphemy and blasphemous libel should be abolished. The question was what, if anything, should replace them. In today's plural society, any replacement would have to apply to all religions and not just Christianity. The Commission reviewed the reasons for having such an offence and discovered four: the protection of religion and religious beliefs; the protection of society; the protection of individual feelings; and the protection of public order. It concluded that the protection of religious feelings was the most persuasive, but the arguments were quite evenly balanced. There was no evidence of a pressing social need for an offence of wounding or outraging religious feelings. It would be very difficult to define its elements with sufficient precision. In particular it would be very difficult to define what was meant by a religion. The Commission therefore reached the provisional conclusion that the offences should be abolished without replacement.

The Working Paper provoked a huge response: 1800 organisations, groups and individuals and more than 175 petitions with a total of 11,770 signatures, many in response to organised campaigns. This was much greater than any of the other Working Papers which the Commission had published. Respondents were overwhelmingly against the provisional proposal. But of those who were clearly responding to the Working Paper rather than to media reports, opinion within the Churches was generally against abolition without replacement, and opinion within the legal profession and academics was generally in favour. The Church of England was in favour of a replacement that would extend to all religions. Interestingly, while most of the main religious Christian, Jewish and Islamic organisations responded, the Hindus, Sikhs and Buddhists did not.

When the Commission came to consider what to make of all of this, its membership had changed. Mr Justice Kerr and William Forbes QC were replaced by Mr Justice Ralph Gibson and Brian Davenport QC. Davenport QC was in charge of the criminal law team. The new Commission decided that it would recommend a new offence of injuring religious feelings which would apply to members of all religions without defining what was meant by a religion. Excessive prosecutorial zeal would be met by requiring the Director of Public Prosecutions or the Attorney General to consent to a prosecution. A report was drafted but it was then the practice for all Law Commission reports to be accompanied by a draft Bill to give effect to

⁶ Law Commission, *Offences against Religion and Public Worship* (WP No 79, 1981).

its recommendations. So this report had to wait until the Parliamentary drafters attached to the Commission had time to draft a Bill. It was clear that they did not relish the task.

That was how things stood in May 1984 when Stephen Edell and Dr Stephen Cretney had left the Commission and been replaced by Professor Julian Farrand and Mrs Brenda Hoggett (as I then was), respectively. One of the first things to hit our desks was the blasphemy project. Professor Farrand was a lifelong atheist, and a member of the National Secular Society, so it was not surprising that he immediately voiced his doubts about the proposal. I was, and remain, a (not very) practising member of the Church of England, so it was perhaps more surprising that I voiced my strong opposition to it. Dr North was due to leave the Commission shortly, so it was decided to wait and see what his replacement would say. Trevor Aldridge, a solicitor, arrived in September and he very soon allied himself with Farrand and me. So what had been a unanimous report in favour of replacement became a three to two report in favour of abolition without replacement. The resulting report with accompanying Bill and Note of Dissent was published in 1985.⁷

Of course, nothing was going to come of it. What government was going to risk alienating its supporters both in and out of Parliament by trying to abolish blasphemy? But ‘never say never’ in law reform. There are some reforms whose time will come; and the time came in 2008. Section 79 of the Criminal Justice and Immigration Act 2008 abolished the crimes of blasphemy and blasphemous libel. The National Secular Society held a ‘bye bye blasphemy’ party, to which Julian Farrand and I were invited. Sir Ian McKellen read the Kirkup poem (which is why I know that it is not very good).

The arguments for and against having a criminal offence of blasphemy

But I must go back to the Law Commission’s 1985 report, because the seeds of the reason why its time did eventually come were sown in that report. It is also a very useful discussion of the arguments for and against having a criminal offence of blasphemy.

Protection of religion and religious beliefs

The first rationale given for such an offence was the protection of religion and religious beliefs. This was regarded by a large majority of respondents to the Working Paper as the strongest reason for retaining the offence – most of them referring to the Christian religion alone. The problem is that it can only apply to the protection of the God of one faith. It is quite rational for a state which has a state religion to protect that religion – whether Judaism in Israel or Islam in Bangladesh. Indeed that appears to have been a reason for recognising the secular offence in this country. But although we still have an established church in England (although not in Scotland,

⁷ Law Commission, *Offences against Religion and Public Worship* (Law Com No 145, 1985). The report can be accessed here: <https://assets.publishing.service.gov.uk/media/5a7b8ac4e5274a7318b8f553/0442.pdf> (accessed 7 June 2025).

Wales or Northern Ireland), this no longer means that everyone has to belong to it. It is no longer the policy of our law to assert the truth of any particular religion by means of the criminal law. Instead, we assert the right of everyone to hold and manifest their own religion or belief, including the belief that there is no God.⁸ Indeed, it could even be argued that it is not very Christian to assume that our God is in need of special protection or to oblige the unwilling to respect Him.

Protection of society

Another rationale was the protection of society. Attacking religion, it was said (by *The Times* on 13 July 1977):

amounts to an attack upon the fundamental decencies and mutual respect on which society operates and could damage the stability of a community. Allowing total freedom to insult the religious beliefs of others can also have a profoundly adverse effect on the harmony that exists between different groups, particularly, perhaps, where racial and religious divisions go together.

The problem with this argument is that everyone agreed that ‘no harm is done by rational and sober, as distinct from scurrilous or abusive, treatment of religious matters’. Yet it is quite possible for a work of serious literature to induce outrage among some people – we might think of Salman Rushdie and *The Satanic Verses* as an example; and rational discussion may be much more persuasive than scurrilous abuse and thus induce much stronger feelings in response. Indeed, as the Working Paper said:

if society would suffer as a result of an absence of respect shown to religious beliefs, it may be suggested that it will suffer all the more if such beliefs are subject to destructive analysis and criticism, even if temperately expressed, since reasoned persuasion is ultimately far more effective in its aim than attacks devoid of intellectual content.⁹

So, can it really be said that it is damaging to society to be rude about religion but not damaging to society to undermine religion by reasoned argument? This looks more and more like the first argument – the need to protect religion, which begs the question of which religion?

In any event, as the Commission pointed out, the distinction between manner and matter is probably unsustainable:

Ridicule has for long been an acceptable means of focusing attention upon a particular aspect of religious practice or dogma which its opponents regard as offending against the wider interests of society, and in that context use of abuse or insults may well be a legitimate means of expressing a point of

⁸ Article 9 of the European Convention on Human Rights 1950, incorporated into UK law by the Human Rights Act 1998.

⁹ Law Commission (note 6), para 7.10.

view upon the matter at issue. The imposition of criminal penalties upon such abuse or insults becomes, in our view, peculiarly difficult to defend in the context of a 'plural' or multi-racial, multi-religious society. Here one person's incisive comment (or indeed seemingly innocent comment) may be another's 'blasphemy'.¹⁰

Some religious practices are not in the best interests of society and deserve condemnation: as Professor JC Smith commented in response to the *Gay News* case. He wrote:

Should it not be possible to attack in the strongest possible terms religious beliefs that adulterers should be stoned to death and that thieves should have the offending hand lopped off, however offensive that may be to the holders of that belief?¹¹

Finally, on this point, the Commission suggested that the existence of a criminal offence for which there was little or no justification, and indeed good reason *not* to impose criminal sanctions, as it affects the sensitive area of freedom of speech, might itself be a source of conflict.

Protection of religious feelings

A third rationale was the protection of religious feelings. In the Working Paper, the Commission had thought this the most persuasive argument, although by no means decisive. Yet the law does not generally impose criminal penalties for injuring a person's feelings. So the argument must depend upon the notion that religious feelings are different from any other kind of feelings and worthy of special respect. Many religious believers do indeed believe this. The Working Paper had suggested that such feelings might be different because of the 'special reverence felt for what is deemed sacred'. But is such reverence special in nature or in degree?

If it is thought special only in *degree* – i.e. its depth or extent – then what is the evidence for this? Many people feel equally strongly about all sorts of things – including the lack of religion – but they are not protected from being upset. If it is thought special in *kind* – in nature – then again what is the evidence for this? Is there any real difference between reverence for a Deity and other kinds of reverence, for example, for your country, your monarch, your national flag, your football team, or your parents? Contempt for any of these may be thought just as deplorable as contempt for a Deity. But we cannot extend the criminal law to protect all these sorts of feelings. This would be a serious interference with freedom of speech. Reverence for a Deity may differ in degree from reverence for other sorts of beings or institutions, but it does not differ from them in kind.

¹⁰ Law Commission (note 7), para 2.35.

¹¹ [1979] Crim LR 312–313.

Protection of public order

The final rationale was the protection of public order. We all know that the expression of beliefs about religion – for or against, general or particular – can arouse strong feelings which can escalate into public disorder and worse. In September 2022, hundreds of young men fought one another and the police over two nights in Leicester, all said to be sparked by the anti-Islamic policies of the BJP in India. But we have the Public Order Act 1986 to deal with that – which penalises threatening, abusive or insulting words or behaviour or the display of any writing, sign or other visual representation which is likely to cause harassment, alarm or distress. Is there any evidence that purely private attacks upon religion are likely to lead to public disorder?

The Law Commission report makes an important distinction between attacks upon a religion and attacks upon the people who hold its beliefs. Indeed, were the Leicester riots sparked by the BJP's attacks on Islam or by its demonisation of Muslims and other minority groups? The offence of blasphemy is aimed at attacks on religion, not at attacks on people who hold particular religious beliefs. Back in 1985, the Law Commission pointed out that there already were offences of intentionally stirring up racial hatred, introduced by the Race Relations Act 1976 in response to a known problem of hostility towards racial minorities. It observed that:

if in future there appears to be a substantial problem relating to the availability of material which in form is an attack upon particular religious beliefs, but is in substance an attack upon those holding such beliefs, it would seem to be a relatively simple matter to amend the Public Order Act specifically to penalise such material.¹²

The abolition of the common law offences of blasphemy and blasphemous libel

And so it came to pass. The Racial and Religious Hatred Act 2006 added a new part to the Public Order Act 1986, creating offences of intentionally stirring up religious hatred – by using threatening words or behaviour; displaying, publishing or distributing threatening written material; presenting or directing a play which involves the use of threatening words or behaviour; displaying, showing or playing a recording of threatening visual images or sounds; broadcasting a programme involving threatening visual images or sounds; or possessing such material with a view to doing any of these things. All require an intention to stir up religious hatred, meaning hatred towards a group of persons defined by reference to religious belief or lack of religious belief. This is a much more defensible approach – protecting the people rather than the belief. But even this can be regarded by bodies such as Index on Censorship as an unwarranted interference with freedom of speech – and the concepts 'hatred' and 'stirring up' are sufficiently elastic to catch a good deal.

¹² Law Commission (note 7), para 2.29.

Be that as it may, the introduction of these offences meant that blasphemy and blasphemous libel were no longer needed and two years later they were abolished.¹³

European Convention on Human Rights

Despite the strength and depth of its analysis, it is striking that the Law Commission's 1985 Report says very little about the European Convention on Human Rights. The UK was an early party to the Convention and accepted the right of individual petition to the European Court of Human Rights in 1966. But it only gets a mention in a footnote because *Gay News* and *Denis Lemon* tried to take the United Kingdom to the European Court for breach of their Convention rights.¹⁴ They claimed in particular of a violation of Article 10, the right to freedom of expression:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers ...
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, and for maintaining the authority and impartiality of the judiciary.

In those days, complaints had first to be scrutinised by the European Commission on Human Rights. The UK government, no doubt drawing upon the Law Commission report, argued that restricting free speech by the offence of blasphemy was justified for the prevention of disorder, the protection of morals, and the protection of the rights of others. The European Commission pointed out this was a private prosecution, so it could not be said that the public interest in the prevention of disorder or the protection of morals was the real basis for the interference. The real basis must have been the protection of the rights of *Mary Whitehouse*. The Commission considered that the protection of the right of citizens not to be offended in their religious feelings was a legitimate purpose recognised in the Convention.

The Commission also concluded that the restriction was 'necessary in a democratic society':

If it is accepted that the religious feelings of the citizen may deserve protection against indecent attacks on the matters held sacred by him, then it can also be considered as necessary in a democratic society to stipulate that such attacks,

¹³ Criminal Justice and Immigration Act 2008, s 79.

¹⁴ *Gay News Ltd and Lemon v United Kingdom* (1982) 5 EHRR 123.

if they attain a certain level of severity, shall constitute a criminal offence triable at the request of the offended person.¹⁵

The Commission found that it was not disproportionate for the offence to be one of strict liability, irrespective of the intention to blaspheme, the intended audience, and the possible avoidability of the publication by the person offended.

So the *Gay News* complaint was found 'manifestly without foundation', as were the other complaints based on Article 9 (freedom of religion and belief), Article 7 (no punishment without law), and Article 14 (no discrimination in the enjoyment of Convention rights).

The European Court of Human Rights continues to believe that the protection of religious feelings is a legitimate aim. In *Wingrove v United Kingdom*,¹⁶ the applicant's video work, *Visions of Ecstasy*, was refused a classification certificate by the British Board of Film Classification (without which it was a crime to show the film) because it infringed the criminal law of blasphemy. As it depicted a woman in a nun's habit apparently having sex with the crucified Jesus, this is scarcely surprising. But the European court held by seven votes to two that there was no violation of Article 10. Protecting Christians from outrage fell within the legitimate aim of protecting the rights of others.

More recently, in *ES v Austria*,¹⁷ the court held that convicting the complainant of blasphemy did not violate her Article 10 rights. In a seminar about Islam, she had referred to the fact that at the age of 56 the prophet Mohammed had married a six-year-old girl and had consummated the union when she was aged nine and commented 'what do we call it, if it is not paedophilia?'. The court held that the purpose of the law was 'preventing disorder by protecting religious peace, as well as protecting religious feelings, which corresponds to protecting the rights of others'.¹⁸ In assessing whether the restriction was necessary in a democratic society, the national authorities enjoyed a wide margin of appreciation and also had a 'positive obligation under Article 9 of the Convention of ensuring the peaceful co-existence of all religions and of those not belonging to a religious group by ensuring mutual tolerance'.¹⁹ The national court had 'carefully balanced the applicant's right to freedom of expression with the rights of others to have their religious feelings protected and to have religious peace preserved in Austrian society'.²⁰

Recommendations from other international instruments

It is interesting that most international instruments draw the distinction which English law now draws between injury to religious feelings and stirring up religious

¹⁵ Ibid, para 12.

¹⁶ *Wingrove v United Kingdom* (1996) 24 EHRR 1.

¹⁷ *ES v Austria* (2019) 69 EHRR 4.

¹⁸ Ibid, para 41.

¹⁹ Ibid, para 44.

²⁰ Ibid, para 57.

hatred. Thus the Council of Europe Parliamentary Assembly in 2007 recommended that ‘blasphemy, as an insult to religion, should not be deemed a criminal offence’.²¹ The European Commission on Democracy through Law, the Venice Commission, stated in 2008 that ‘it is neither necessary nor desirable to create an offence of religious insult (that is, insult to religious feelings) simpliciter, without the element of incitement to hatred as an essential component’.²² The United Nations Human Rights Committee in 2011 commented that ‘Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant (i.e. the International Covenant on Civil and Political Rights) except in the specific circumstances envisaged in article 20(2)’, that is, ‘advocacy of ... religious hatred that constitutes incitement to discrimination, hostility or violence’.²³ And the European Parliament in 2012 recalled ‘that national laws that criminalise blasphemy restrict freedom of expression concerning religious or other beliefs, that they are often applied to persecute, mistreat or intimidate persons belonging to religious or other minorities, and that they can have a serious inhibiting effect upon freedom of expression and on freedom of religion or belief; recommends that the Member States decriminalise such offences ...’.²⁴

So I will end with a Member State, perhaps a surprising one, which has recently done just that. This is the Republic of Ireland. Being a country almost defined by the predominant religion of its people, the Roman Catholic faith, its 1937 Constitution required it to criminalise the publication or utterance of blasphemous matter. It was thought that the inherited English common law of blasphemy did just that. But in 2009 the Defamation Act created a statutory offence which criminalised the publication or utterance of blasphemous matter defamatory of *any* religion. Not long after that, respect for the Roman Catholic church collapsed and the mood in Ireland radically changed. In 2018 a referendum on amending the Constitution to remove the requirement to criminalise blasphemy was supported by nearly 65% of the people voting. And in 2020 the law was repealed. Interestingly, the amendment had the support of all political parties and many other organisations. The Irish Catholic Bishops Conference did not oppose it, observing that the law was obsolete and that similar laws had been used elsewhere in the world to justify violence and oppression against minorities. The Islamic Cultural Centre of Ireland was among the very few organisations to oppose it.

Conclusion

I am all for promoting religious peace and toleration. I can live with criminalising the intentional stirring up of religious hatred, provided that the strong word ‘hatred’ is not watered down too much. But I am not in favour of punishing those who offend religious feelings. In a pluralistic and tolerant society we ought all to be able to cope

²¹ Council of Europe Parliamentary Assembly: recommendation 1805.

²² European Commission on Democracy through Law: CDL-AD (2008)026, para 89.

²³ United Nations Human Rights Committee: General Comment No 34, para 48.

²⁴ European Parliament: 2013/2078 (INI), para 35.

with having even our deepest feelings offended. And I remain unconvinced that religious feelings necessarily differ in depth or in kind from many other feelings.

Acknowledgements. This article is based on a lecture delivered to the Oxford Centre for Islamic Studies and the Woolf Institute in Cambridge in 2023.