



Is Incitement to Religious Hatred the New Blasphemy? Professor Ivan Hare

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What I want to say this evening falls into three parts. In the first, I shall define what lawyers mean when they talk about blasphemy and incitement to religious hatred. That will involve saying something about the history of both prohibitions. In the second part, I shall invite you to look critically at the justifications which have been advanced for these offences. In the final section, I want to draw out some of the difficulties these crimes present from the point of view of freedom of expression and our liberty more generally.

Chronologically, the definition of blasphemy should come first. *Stephen's Digest of the Criminal Law*, 9th ed, 1954 provides:

"... 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."

A few issues emerge from that. First, the definition was at once very broad and rather narrow. It was broad in that it applied to a very wide range of statements or representations: "ludicrous matter relating to God, Jesus Christ, or the Bible, or the formularies of the Church of England" could stand as a fair summary of much British television comedy over the last fifty years. It certainly was a prominent feature of the filmed output of Monty Python and many in this audience will remember the debate in November 1979 between Michael Palin and John Cleese, on the one hand, and Malcolm Muggeridge and Mervyn Stockwood (then Bishop of Southwark), on the other, concerning the film, *The Life of Brian*. Further, there was no requirement of any intention to express contempt or to ridicule sacred matters (as a majority of the Law Lords affirmed in upholding the conviction of the editor and publisher of *Gay Times* in 1977). There were no defences either: unlike one of the other criminal libels, obscenity, where a defence of artistic merit had been introduced in 1957. So much for its breadth.

Blasphemy was narrow in that it was confined not just to the Christian religion, but to that branch of Christianity which is the established church of this country: the Church of England. I should add that Stephen's definition of blasphemy was itself substantially narrower than that which had been applied throughout most of the history of the offence because he went on:

"It is not blasphemous to speak or publish opinions hostile to the Christian religion, or to deny the existence of God, if the publication is couched in decent and temperate language. The test to be applied is as to the manner in which the doctrines are advocated and not as to the substance of the doctrines themselves."

The narrowing of the definition to exclude denying the existence of God if done in "decent and temperate language" came early enough in the Victorian era to keep Charles Darwin and Thomas Huxley out of gaol. That narrowing was much needed. A flavour of the breadth of the earlier definitions emerges from the first case in which the Common Law (as opposed to ecclesiastical) courts of this country considered that they had jurisdiction over blasphemy. In *Taylor's case* in 1676, the Court of King's Bench had to consider statements including: "Christ is a whoremaster, and

religion is a Cheat...I am Christ's younger brother and that Christ is a bastard." For good reason, Taylor has been described as a blasphemer of unusual thoroughness. Chief Justice Hale justified the jurisdiction of the Court of King's Bench over such matters in the following terms:

"These words, though of ecclesiastical cognisance, yet that religion is a cheat, tends to the dissolution of all government, and therefore punishable here, and so of contumelious reproaches to God, or the religion established. An indictment lay for saying the Protestant religion was a fiction for taking away religion, all obligations to government by oaths etc ceaseth, and Christian religion is a part of the law itself, therefore injuries to God are punishable as to the King, or any common person."

A criminal offence of such breadth is particularly terrifying when the potential penalties at the time are examined. James Naylor was found guilty of blasphemy (by the House of Commons) in 1656 for riding into Bristol on a donkey allegedly in imitation of the entry of Christ into Jerusalem. His punishment was, by any measure, severe: he was whipped from Westminster to the Old Exchange there to be pilloried, have his tongue bored with a hot iron and the letter "B" branded on his forehead. As if that wasn't enough, he was also sentenced to be "kept in prison at hard labour indefinitely".

You might assume there was a powerful justification for treating blasphemy so harshly. Based on Chief Justice Hale's summary, it appears that the justification for criminalising blasphemous utterances was threefold: that they would undermine the reliability of oaths; that they would lead to the dissolution of all government; and that Christian religion is part of the law itself. None of these reasons bears any scrutiny and yet they remained substantially unchallenged until the Victorian era when the fiction that law and Christianity were the same was finally so described and a new justification was substituted in seeking to protect certain religious feelings from vilification. Why religious feelings are entitled to a higher level of protection than other sincerely and profoundly held beliefs is not explained and neither is why only certain Christian religious feelings and not other Christian sects or other religions are protected. When the Court declined to extend the scope of blasphemy to cover Salman Rushdie's *The Satanic Verses*, it didn't address the rationale for the offence, just its clear limits based on the established authorities.

That's all very interesting, you might say, but what's its relevance now given that blasphemy was abolished in England and Wales by Parliament in 2008? I think there are three elements to the contemporary relevance of blasphemy. First, it is important to remember that as recently as 2007, it was sought to bring a private prosecution for blasphemy against the producer and the broadcaster of the (filmed) stage play *Jerry Springer: The Opera*. In fact, it was that failed prosecution which finally spurred Parliament into action. Secondly, blasphemy remains an offence and is actively prosecuted in many other parts of the world. Thirdly, the length of time it took to recognise how unsatisfactory the rationale for the blasphemy law was is a useful reminder to us of the need continually to re-assess the validity of the arguments used to restrict free speech and that is what I am inviting you to do in relation to incitement to religious hatred and other similar actual or proposed criminal offences.

That brings me to what we mean by incitement to religious hatred, at least in England and Wales. Section 29 of the Public Order Act 1986 (as amended in 2006) provides:

"29B(1) A person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred.

29A In this Part "religious hatred" means hatred against a group of persons defined by reference to religious belief or lack of religious belief."

It is important to state that the term incitement is a shorthand. Incitement is a term of legal art: an inchoate offence (others are attempt and conspiracy) which is linked to another free-standing crime as in incitement to murder. The offence under s. 29 refers to “stirring up” hatred. “Stirring up” is not a term of legal art or at least wasn’t until the offence of stirring up racial hatred was introduced in the Race Relations Act 1965.

Having said that, there are some obvious similarities between blasphemy and incitement to religious hatred: both create criminal liability relating to forms of religious speech and those convicted can face substantial prison sentences (up to seven years for stirring up religious hatred). There are other links between the two offences. For example, Baroness Andrews justified the legislative amendments abolishing the common law offence of blasphemy to the House of Lords in 2008 in part on the basis that the offence of incitement to religious hatred was on the statute book and that would provide adequate protection for individuals for vilification of their beliefs. As such, some at least appeared to regard incitement to religious hatred as a non-denominational form of blasphemy. That link is maintained in the Hate Crime and Public Order (Scotland) Act which was passed by the Scottish Parliament on 11 March 2021 and introduces the new incitement provisions (including Scotland’s first incitement to religious hatred provisions) in the same Act which abolishes the offence of blasphemy.

We have looked at the justification for blasphemy laws; what is the justification for introducing the stirring up offence in relation to religion? Three main arguments were relied on in 2006 when the offence was introduced in England and Wales: first, that a new offence is necessary to address the serious social problem of incitement to religious hatred; secondly, that such an offence is required to remove the discriminatory protection presently afforded to Jews and Sikhs by the Public Order Act’s provisions on incitement to racial hatred; and thirdly, that the offence is required to comply with the UK’s international legal obligations. I would make the following brief observations on each of those justifications. As to the first, even if this assertion is empirically true, we must remember that a number of existing offences cover substantially the same ground. Most obviously, section 5 of the Public Order Act is committed by the use of threatening or abusive words or behaviour within the sight or hearing of a person likely to be caused harassment, alarm, or distress thereby—an offence which may be aggravated by religious hostility. As to the second, it is true (as explained above) that the incitement provisions in the earlier version of the Public Order Act did provide some protection for Sikhs and Jews, but not for Muslims, Hindus, or Christians. However, this protection was not provided to them as religious groups, but because of their status as ethnic groups as defined by the then Race Relations Act. As such, it is not accurate to say that Sikhs and Jews are treated more favourably as *religions* and, in any event, there are other ways of removing that anomaly. The third justification is simply not correct: there is no requirement on the UK under international law to criminalise incitement to religious hatred.

So much for the arguments in favour of such offences, but some will say that incitement to religious hatred (as drafted) has little impact on free speech: as the definition makes clear, the speech must be “threatening”, it must be in public and the defendant must intend to stir up hatred. Further, there is a free speech clause which provides:

“29J Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.”

I accept all of these points. However, although they mitigate its impact on free speech, they do not address the absence of justification for the offence in the first place. Further, I want to end by drawing attention to what I have called elsewhere the “Trojan horse” nature of the stirring up offences. This

has two elements. When the original crime of incitement to racial hatred was introduced in 1965, it was justified in part because it was tightly drawn. Over time, those limitations were released so that intention to stir up hatred was no longer required, the offence was not confined to a public forum and the maximum term of imprisonment was increased from six months to seven years. A similar process of expansion may happen in relation to religious hatred. Once an offence is on the statute book, it is very difficult to abolish it, but incremental relaxations are much easier and attract less attention. The second element is that once the protected characteristic is expanded beyond race, there is scope for very considerable expansion. Incitement to religious hatred was followed in England by criminalisation of incitement to hatred on grounds of sexual orientation. Other groups are entitled to ask why they are not protected from hatred being stirred up against them. The Scottish Act referred to above also includes hatred on grounds of age, disability, transgender identity and “variations in sex characteristics” and provides that the characteristic of sex itself may be added by Regulations (and so would not require a further Act). Whether further extension will take place in England is presently before the Law Commission and will mark the next chapter of what Lord Diplock in the *Gay Times* case called the “long and inglorious history” of the law’s attempts to deal with hatred and vilification.

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