RELIGIOUS OFFENCES

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INTRODUCTION

In the aftermath of the tragedies in the United States on 11 September 2001, the news media in the United Kingdom reported a great increase in crime and attacks on Muslims. A Director of the Central Mosque spoke publicly of the unprecedented backlash against the British Muslim community and whilst emphasising Islam to be a religion of peace and opposed to terrorism, urgently stressed the need for greater protection. The police chiefs were responsive. The government had to act.

It included in the Anti-Terrorism, Crime and Security Bill 2001[1] a provision to extend incitement to racial hatred in the Public Order Act of 1986 to religious hatred. In the event the House of Lords deleted this provision but left in place other clauses creating religiously aggravated offences, which passed into the legislation. It was felt that the issues and questions raised by the proposal for a new religious hatred offence were not suitable for inclusion in emergency terrorist legislation and that a new Select Committee in the House of Lords should be established to report on the whole spectrum of religious offences. By the time you read this article the report of the Select Committee should have been tabled and debated in the House of Lords. The Select Committee received both written and oral evidence for the purpose of considering:

(1) the state of the law relating to religious offences and whether existing religious offences (in particular blasphemy) should be amended or abolished; (2) whether a new offence of incitement to religious hatred should be created and, if so, how it should be defined.

In this context, as the law stands, both Jews[2] and Sikhs[3] for example are protected by existing *racial* hatred provisions because they are distinct racial groups, whereas Christians and Muslims are not protected since they are evangelical religions which comprise all known races. Equally, the law of blasphemy protects only Christians. The Select Committee Report addresses the effectiveness of the existing legal provisions and poses some of the questions that fall for consideration if the weight of opinion proves in favour of changing the law.

[1] Anti-Terrorism, Crime and Security Act 2001, Pt 5.
[2] *Seide v Gillette Industries Ltd* [1980] IRLR 427, EAT.
[3] *Mandla v Dowell Lee* [1983] 2 AC 548, [1983] 1 All ER 1062, [1983] 2 WLR 620, HL.

EXISTING LAW

Apart from the common law offence of blasphemy and blasphemous libel, and the statutory provisions relating to religiously aggravated offences, it is instructive to consider the offence of incitement to racial hatred under the Public Order Act 1986.

(a) *Blasphemy*

The crime of blasphemy has an ancient provenance. The persecution of religious dissent is associated with even the most rational and tolerant societies. The word itself is of classical Greek origin and even the Athenian democracy, the cultural centre of the ancient Greek world, encompassing every known shade of political, religious, scientific and philosophical opinion and practice, was constrained to prosecute Socrates, arguably its most distinguished philosopher, for his persistence in asking questions about the fundamental values of Athenian religious, moral and social attitudes. In essence Socrates was accused of corrupting the young and observing strange religious practices instead of worshipping the gods recognised by the city of Athens. It was also argued against him that he worshipped no god at all. To the Athenians, religion was a matter of public observance, not private belief, and the public observance of religious rites, like the acceptance of the received theology, was crucial to the survival of the state. Impiety was not a matter of assaulting or undermining an individual belief, nor was it a matter of exercising human rights. It was a threat to state security.[4] Four hundred and thirty-two years after Socrates was executed, Christ was crucified following his trial and conviction for blasphemy against Judaism in which the offence had originated as long ago as the second Commandment.[5] The imperatives driving the persecution and death of Christ were rooted in the need to preserve the security of the Jewish state and much the same justification for preserving blasphemy as a crime under English law has been put forward. It has been said that the offence was designed to safeguard the internal tranquillity of the United Kingdom.[6] Certainly the law as administered by Hale CJ in 1675 expressly linked Church and state and firmly predicated preservation of civil society upon protection of religion: 'to reproach the Christian religion is to speak in subversion of the law'.[7]

As the offence of blasphemy evolved under English law it was characterised by increasing tolerance. The approach taken originally by Lord Coleridge in the prosecution of Ramsay and Foote in 1883,[8] following the publication by the defendants of a newspaper in which they attacked the sanctity of Christianity, was to become the paradigm in the twentieth century.

[4] See Plato, *Apologia of Socrates*.
[5] Exodus 20 : 7.
[6] *Whitehouse v Lemon, Whitehouse v Gay News Ltd* [1979] AC 617 at 658, *sub nom R v Lemon, R v Gay News Ltd* [1979] 1 All ER 898 at 921, HL, per Lord Scarman.
[7] *R v Taylor* (1676) 1 Vent 293.
[8] *R v Ramsay and Foote* (1883) 15 Cox CC 231.

Coleridge held that the mere denial of the truth of Christianity is not enough to constitute the offence of blasphemy. Its purpose was not to protect society but to protect individual feelings. He accepted that radical criticism of Christianity should be permitted, if it was expressed in a reasonable manner. In its concern with the manner of delivery and the impact upon members of society, the offence of blasphemy by now carried clear public order implications. Subsequent cases serve to confirm that, at its core, the crime lay in expressing or publishing words in terms which were calculated to outrage Christians or those sympathetic to Christianity. But, as contemporary commentators noted from time to time, the law developed a perceptible class distinction between those endowed with the attributes of a fine education and the ability to argue effectively in moderate language, and those on the other hand who railed in hurtful and angry terms about the hypocrisies, self-deceptions and illiberal postures of established religion.

By the 1960s, however, Christianity within the United Kingdom was in decline. Promoters of logical positivism refused to accept moral absolutes, and all Christian churches became less confident in their moral certainties. The humanists took the lead, urging reforms of the moral code. Radical changes in the laws on capital punishment, abortion, family planning, homosexuality and divorce were in place by the end of the 1960s.

But with social reform there came also a more relaxed and tolerant attitude to sexual mores. The acquittal of the publishers of D H Lawrence's book, *Lady Chatterley's Lover*, on a charge of obscenity, pioneered the way for publication of explicitly sexual material, the abolition of theatre censorship, the relaxation of cinema censorship, and the liberalisation of material shown on television. With the 'permissive society' came the pressure for unfettered freedom, the need to 'do your own thing' and push experience to the limit. Nowhere was this pressure more keenly expressed than in the arts. Minimalist art flourished in forms and materials which had not, until then, been understood as art at all. With this came the cultivation of the shocking, in theatre, cinema and television, which bewildered traditionalists and caused a phobia amongst critics of making any value judgments between high and popular art.[9]

A counter crusade was inevitable. In the 1950s, writers such as F R Leavis and Raymond Williams had argued that moral quality will be lost in a levelling down of civilisation, and that all good art, especially literature, must embody a strong moral sense. It was Mrs Mary Whitehouse, however, who led the moral rearmament attack in her campaign against the BBC which she characterised as part of the conspiracy 'to remove the myth of God from the mind of men'. Her mission was to clean up the BBC.

In 1976, Mrs Whitehouse commenced a private prosecution for blasphemous libel against Denis Lemon, the Editor, and Gay News Limited, the pub-

[9] See generally *Cambridge Cultural History of Britain*, Vol 9 (Cambridge University Press, 1995).

lishers, of a poem by James Kirkup in their magazine 'Gay News'.[10] It was called 'The Love that Dares to Speak its Name' and was accompanied by illustrated drawings. The poem did not attack Christianity, but it portrayed homosexual love involving the body of Christ immediately after his death. It suggested that Christ had been a practising homosexual. The indictment referred to the poem as 'a blasphemous libel concerning the Christian religion, namely an obscene poem and illustration vilifying Christ in his life and in his crucifixion'. The defendants were convicted. The newspaper was fined £1,000. The prosecution was awarded its costs.

The issues on appeal centred around the intention of the publishers and, secondly, the tendency of the material to cause a breach of the peace. All of the judges in the Court of Appeal and in the House of Lords considered that the relevant intent was merely to publish an item found to be blasphemous, and it was not necessary for the prosecution to prove that the defendants intended to blaspheme. Three judges in the Court of Appeal and two in the House of Lords held that it was not an essential ingredient of the crime of blasphemy that the publication must tend to lead to a breach of the peace.

The trial judge had defined blasphemy as

> anything concerning God, Christ or the Christian religion in terms so scurrilous, abusive or offensive as to outrage the feelings of any member of or sympathiser with the Christian religion and to tend to lead to a breach of the peace.

All the judges on appeal approved of that definition. Lord Scarman adopted a definition from Stephen's *Digest of the Criminal Law*:

> Every publication is said to be blasphemous which contains any contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ, or the Bible, or the formularies of the Church of England by law established. 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 themselves.[11]

This definition was subsequently also endorsed by Lord Justice Watkins, when the court refused leave to issue a prosecution against Salman Rushdie and the publishers of *Satanic Verses*, on the ground that the English criminal offence of blasphemy protected only the Christian religion.[12] In the view of many, blasphemy had now become virtually an offence of strict liability, for the intent to publish was the only critical *mens rea*. One commentator

[10] *R v Lemon, R v Gay News Ltd* [1979] QB 10, [1978] 3 All ER 175, CA (Crim Div).
[11] Stephen, *Digest of the Criminal Law* (9th edn, 1950); *R v Lemon, R v Gay News Ltd* [1979] AC 617, [1979] 1 All ER 898, HL.
[12] *R v Chief Metropolitan Stipendiary Magistrate, Ex parte Choudhury* [1991] 1 QB 429, [1991] 1 All ER 306, [1990] 3 WLR 986, DC.

noted that it was now a blasphemous libel to publish insulting words attacking or ridiculing the Christian religion, which might possibly make believers angry.[13] So at common law, blasphemy has survived as a criminal offence to protect at least Christians from outrage, vilification and ridicule.

(b) *Religiously Aggravated Offences*

As part of its strategy to deal with the growth in incidents of racial hatred, Parliament legislated on the concept of racially aggravated crime. Cases involving offences against the person (grievous bodily harm, wounding, common assault), causing criminal damage, harassment and causing alarm, distress, fear or provocation[14] would become aggravated offences if, when committed, they were racially aggravated. If there is no aggravation, there is no offence under Section 28(1) of the Crime and Disorder Act 1998. An offence is racially aggravated in one of two ways:

(1) If at the time of committing the offence or immediately before or after doing so the offender demonstrates towards the victim hostility based on the victim's membership (or presumed membership) of a racial group; or
(2) If the offence is motivated (wholly or in part) by hostility towards members of a racial group based on their membership of that group. Membership for this purpose includes association with members and the word 'presumed' means presumed by the offender. An offender is liable to increased punishment.

In December 2001, Parliament extended the statutory provisions involving racially aggravated offences to religiously aggravated offences.[15] So the definition of a racially aggravated offence is now expanded to incorporate religious aggravation, and the victim's membership or presumed membership is extended from a racial to a racial or religious group for the purpose of demonstrating hostility. Equally, an offence is racially or religiously aggravated if it is motivated wholly or in part by hostility towards members of a racial or religious group based on their membership of the group. As extended, section 28(1) describes the groups in the following terms:

(1) In this section 'racial group' means a group of persons defined by reference to race, colour, nationality, (including citizenship) or ethnic or national origins.
(2) In this section 'religious group' means a group of persons defined by reference to religious belief or lack of religious belief.

Parliament had also provided for sentence enhancement where any other offence was racially aggravated. The gravity of the offence was in effect increased by racial motives. The Powers of Criminal Courts (Sentencing) Act 2000 in section 153(2) provided that where the court found an offence

[13] J R Spencer in the *Cambridge Law Journal*, November 1979.
[14] Crime and Disorder Act 1998, ss 28–32.
[15] Anti-Terrorism, Crime and Disorder Act 2001, s 39.

(other than offences described in Sections 29 to 32 of the Crime and Disorder Act 1998, relating to offences against the person or criminal damage or public order and harassment) was racially aggravated then it had to treat that fact as an aggravating factor increasing the seriousness of the offence. The court was obliged to say so in open court before passing a more severe sentence. The policy, of course, behind that legislation was to address the growth in hate crime, particularly against Muslims, whose perception that the legal system treated them unequally was steadily increasing.[16] The legislation extends this approach to religious aggravation.[17] This law impacts upon the sentence, not on the substantive offence, so that racial or religious aggravation makes an offence more serious for the purpose of sentencing. A substantive charge of theft, for example, does not become 'racially aggravated theft'; it simply attracts a severer sentence.

(c) *Incitement to Racial Hatred*

If there is to be an offence of incitement to religious hatred then society's experience with the existing offence of incitement to racial hatred would be relevant, if not illuminating. It is of course an offence under the Public Order Act 1986, which had its provenance in the Public Order Act 1936, passed to address the demonstrations and clashes involving the British Union of Fascists. It banned incitement to violence. The Race Relations Act 1965 established the Race Relations Board and introduced the offence of incitement to racial hatred. In 1976, the Commission for Racial Equality replaced the Race Relations Board and the Act also prohibited racial discrimination in the fields of employment and training and housing. The latest formulation of the law is in the Public Order Act 1986, which provides:

> A person who uses threatening abusive or insulting words or behaviour or displays any written material which is threatening, abusive or insulting is guilty of an offence if:
> (*a*) he intends thereby to stir up racial hatred or
> (*b*) having regard to all the circumstances racial hatred is likely to be stirred up thereby[18]

There is no definition of the words 'to stir up' nor any guidance.

EFFECTIVENESS OF EXISTING LAW

(a) *Blasphemy*

The persistence of blasphemy as an offence into the twenty-first century suggests that there is a substratum of reverence for God in modern society, rooted deep in the foundations of the social fabric,[19] and it has survived the application of Human Rights jurisprudence.

[16] N Addison, *Racially Aggravated Offences* http:/www.harassment/law.co.uk
[17] Anti-Terrorism, Crime and Security Act 2001, s 39(7).
[18] Public Order Act 1986, s 18.
[19] In *Bowman v Secular Society Ltd* [1917] AC 406 at 459, HL, Lord Summer said 'Blasphemy serves to protect the fabric of society'.

It may be thought that such a law would undermine the freedom of expression guaranteed by Article 10 of the European Convention on Human Rights, which provides:

> 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. This Article shall not prevent States from requiring the licensing of broadcast, television or cinema enterprises.

But there are restrictions:

> The exercise of this right, since it carries with it duties or 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 interest 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...

So the restriction must be: (a) prescribed by law, and (b) necessary in a democratic society.

Legislation imposing effective and appropriate controls on the making of racially or religiously offensive statements, or distributing racially or religiously offensive material, is firmly located within these limitations. When the publishers of Gay News Limited and its editor applied to the European Commission on Human Rights, on the basis that their freedom of expression was restricted by the common law offence of blasphemy, the Commission concluded that the offence was not only well established, but had as its main purpose the protection of the right of citizens not to be offended in their religious feelings by such publications. It also concluded that such a restriction was necessary within a democratic society where attacks on religion were severe and the domestic courts had judged the published literature to be blasphemous. Such an offence is thought not to be disproportionate to the legitimate aims of protecting the rights of others.[20] A similar approach was taken by the Commission in relation to cases concerning Holocaust denial.[21]

Indeed, Lord Scarman sought to justify the existence of blasphemy by invoking Article 9 of the Convention (which entrenches the right to freedom of religion and worship) and interpreting this right as conveying a corresponding duty on society not to offend the religious freedoms of others.[22]

In 1994, the European Court of Human Rights decided that the seizure and forfeiture of a film said to disparage religious doctrines contrary to the

[20] *Gay News Ltd and Lemon v United Kingdom* (1982) 5 EHRR 123.
[21] *X v Germany* 9234/81; *T v Belgium* 9777/82
[22] *Whitehouse v Lemon, Whitehouse v Gay News Ltd* [1979] AC 617 at 665, *sub nom R v Lemon, R v Gay News Ltd* [1979] 1 All ER 898 at 927, HL.

Austrian Penal Code did not offend the obligations of Austria under Article 10. Not only was the restriction prescribed by Austrian law but in enforcing it the state of Austria was pursuing a legitimate aim—that is to say, the protection of the rights of others not to be insulted in their religious feelings. The court also thought that such action was necessary in a democratic society, holding that the rights conferred by Article 10 are not absolute, so that in relation to religious belief the freedom was restricted to the extent that gratuitously offensive statements and material constituted an infringement of the rights of others. The pressing social need to preserve religious peace outweighed any artistic merit of the film.[23] It was emphasised that a certain margin of appreciation must be left to the state in judging whether to interfere and if so to what extent. A similar approach was taken in the case of Wingrove who had failed to secure a licence for his film *Visions of Ecstasy* concerning St Theresa.[24]

These authorities demonstrate that the European Court of Human Rights is balancing, not always without difficulty, freedom of expression and the interests of others, and that whilst its jurisprudence acknowledges that the protection of ideas and information in a democratic society is crucial (even where the ideas or information offends, shocks or disturbs), it has consistently protected individuals who suffer as a result of such material and ideas.

(b) *Incitement to Racial Hatred*

Unfortunately, there have been relatively few successful prosecutions—only less than three per annum on average because of the requirement that stirring up or incitement to racial hatred must be communicated by 'threatening, abusive or insulting words or behaviour'.

Racists easily avoid extremes of language or words and still manage to convey their meaning. Racist organisations (for example the Racial Preservation Society) have been acquitted of incitement to racial hatred simply because they used correct or polite language. Again the British National Party has been adept at producing leaflets which comply with existing law without using overtly threatening, abusive or insulting words.

Evidentially it has been difficult to prove incitement to racial hatred. The approach in the courts has been to require interpretation of the statutory provisions in their natural ordinary meaning and involves establishing the defendant's state of mind, so that difficult questions such as the degree of hate or dislike have to be judged by the jury or magistrates. The infrequency of prosecution suggests that organisations like the British National Party publish carefully drafted literature which remains within the law and yet is racially offensive. Their entire approach as evidenced by the publications on a web site[25] is to encourage the use of language which is not 'abusive, threat-

[23] *Otto-Preminger Institute v Austria* (1995) 19 EHRR 34, E Com HR.
[24] *Wingrove v United Kingdom* (1997) 24 EHRR 1.
[25] *http//www.bnp.net*

ening or insulting' and to emphasise that there is usually a way of saying 'what you want to say' without breaking the law. It is significant that from the serious riots of 2001 at Oldham and Bradford, where right wing extremist organisations were known to be present, not a single prosecution emerged. A leaflet saying simply 'Keep Oldham white' does not amount to incitement of racial hatred within the statutory provisions, although it is plainly discriminatory. Nevertheless, the imperative of international conventions (in particular the United Nations Convention on Racial Discrimination) is to prevent incitement to racial discrimination. In the criminal law it is plain that this objective has not been achieved and a similarly structured law against incitement to religious hatred may suffer a similar fate. Adullah el Faisal, a Muslim cleric, who urged his followers to kill all 'unbelievers' was found guilty of soliciting murder under the Offences against the Person Act 1861. He was also found guilty of attempting to stir up racial hatred through abusive and threatening words. His lectures were entitled 'No peace with the Jews', and 'Them versus us'. He urged his audience in pursuit of 'Jihad' to exterminate 'unbelievers'. El-Faisal claimed to be interpreting the Koran, while the prosecution accused him of hiding behind a 'cloak of religion' to mask his hatred.[26]

(c) *Religiously Aggravated Offences*

The requirement in section 28(1)(a) of the Crime and Disorder Act 1998 for the prosecution to prove that the offender is motivated by hostility has provided difficulties in establishing the appropriate *mens rea* in racial cases. In the absence of definition, what does 'hostility' mean? No clear principles have emerged from the cases. Compare for example 'do you want some paki' with 'I don't like f—ing pakis—kick them out'. The first expression was held not to be evidence of racial hostility.[27] The second expression was held to be sufficient evidence of hostility for the purposes of the Public Order Act offence of racially aggravated assault.[28] It has been suggested by the Court of Appeal[29] that the question of intent in demonstration of hostility is a question of fact not law.

The problem has been compounded by the fact that there may be a variety of motives for a crime, such as desperation in the case of a drug addict, or envy or greed, but the crime is accompanied by racist language. So in a case where the defendant attempted to recover property from the victim, and assaulted and used racial abuse to do so, it was agreed that the defendant's primary motivation was the recovery of his property.[30] In this and other cases the court has been urged to distinguish between racially motivated crime and crimes accompanied by racist language. These uncertainties have not encouraged the Crown Prosecution Service.

[26] The Times, 25 February 2003.
[27] *Lee Bowyer and Jonathan Woodgate* case cited in Statewatch March/April 2001
[28] *R v Joseph Brian Saunders* [2000] 1 Cr App R 458, CA.
[29] *Crown Prosecution Service v Weeks* (14 June 2000). See also Fernne Brennan 'Racially Motivated Crime the Response of the Criminal Justice System' 1999 CLR 17.
[30] *R v Gunn* [1999] Lawtel 28 October 1999.

The first prosecution for a religiously aggravated offence (using threats, abuse and insults) proceeded to a conviction on the basis of the defendant's admission. He confessed to accosting three young Muslims and saying 'I hate you and I want you out of my country' and 'I hate you especially after September 11'. Although denying racism, the defendant said that his quarrel is with the fundamentalism, which leads to terror.[31]

SOME ISSUES OR QUESTIONS IN LEGISLATING FOR CHANGE

Should blasphemy be retained as an offence at Common Law? Should the existing statutory provisions be continued, or should a new religious offence of incitement to religious hatred be introduced? Obvious tension arises between the need to protect believers from religious hatred, by tempering freedom of expression, and the need to protect freedom of expression.[32] In balancing freedom of expression against the right of religious believers to be protected from religious hatred, the inequality of treatment inherent in the present law of blasphemy between Christianity and other religions invites either abolition or extension of the offence to other faiths. In so far as blasphemy impairs or even removes freedom of conscience to non-Christians, because it stops them speaking or writing indecently about the Christian faith, many Christians will be troubled and sufficiently concerned about religious liberty to advocate the abolition of blasphemy altogether. For them, freedom of choice, such a predominant feature of Christian teaching, is conclusive, and the very idea of imposing an article of faith is antithetical to authentic religion. It is true that in Judaism, Christianity and Islam tolerance for other religious views is expressly laid down as a basis for legal provision in both municipal and international law.[33] The principle that freedom is the essential characteristic of religious faith was aptly expressed by the World Council of Churches: 'God's redemptive dealing with men is not coercive. Accordingly human attempts by a legal enactment to coerce or eliminate faith are violations of the fundamental ways of God with men. The freedom which God has given ... implies free response to God's love'.[34]

In the *Gay News* case Lord Scarman had supported the policy of extending the offence of blasphemy to all religions, whereas the Law Commission, reporting in June 1985 on Offences against Religion and Public Worship, recommended in its majority report that the offence should be abolished without replacement. The minority recommended that the offence should be abolished but replaced with a statutory offence against 'grossly abusive' or insulting material relating to a religion with the purpose of outraging religious feelings and subject to approval of the Director of Public Prosecutions.

[31] *R v Scott* The Times 16 July 2002.
[32] For a general discussion, see Mark Hill, 'A sledgehammer for the nut-cases' in *Church Times*, 19 October 2001, p 8.
[33] See Norman Doe and Anthony Jeremy 'Religious Justifications for Religious Autonomy' in *Current Legal Issues Law and Religion*, edited by O'Dair and Lewis (Oxford University Press, 2001).
[34] The New Delhi Report: *The Third Assembly of the World Council of Churches* 1961, p 159.

In the wake of the Salman Rushdie affair political opinion on reform broadly settled into three categories:

(1) Disregard the pressure from the Islamic movement altogether;
(2) Extend the blasphemy law to cover Islam and other religions on the basis that it cannot be right to protect only Christianity in a multi-cultural society;
(3) Abolish blasphemy and uphold equality between all religions and non-believers, and that we should not tinker with an outmoded law.

Leading free thinkers such as James Fitz-James Stephens, the celebrated lawyer, had argued in the nineteenth century that the only sensible course was to abolish blasphemy altogether, saying 'you cannot in practice send a man to jail for not writing like a scholar or a gentleman, when he is neither one nor the other, and when he is writing on a subject which excites him strongly'.[35] Stephen also articulated the sensitivity of non-believers, positing that if the law was really impartial to punish blasphemy simply because it offends the feelings of believers, then it ought also to punish preaching that offended the feelings of unbelievers. He concluded that the law was based on the principle that Christianity must be protected on the assumption that it is true.

The retention of blasphemy is justifiable because it enhances scope for protecting the United Kingdom Government in the courts under the jurisprudence of the European Court of Human Rights which has interpreted Article 10 (freedom of expression) as:

(1) not absolute;
(2) restricted (for there must be no gratuitously offensive material which infringes others' rights);
(3) counter balanced against the need to preserve religious peace;
(4) tempered if necessary in a democratic society where an attack on religion is severe and the domestic courts have judged an attack to be blasphemous.

The removal of the offence of blasphemy would run against the grain of those European Court authorities which balance the rights of the religious not to be insulted in their religious feelings against the rights conferred by Article 10.

What of the proposal to extend blasphemy to other religions? Certainly the law is perceived to be unequal in its application, not least by Muslims. Under the Race Relations Act 1976, the treatment of racial groups differs, so that the Jewish community is recognised as a racial group and has sufficient protection from the existing prohibition on incitement to racial hatred.[36] Equally, Sikhs have enjoyed the same protection as a racial group since

[35] Stephens, 'The Law on Blasphemy and Blasphemous Libel' *Fortnightly Review*, March 1884, p 289.
[36] *Seide v Gillette Industries Ltd* [1980] IRLR 427, EAT.

1983.[37] But religious groups which are themselves multicultural, composed of members from a diversity of ethnic backgrounds and therefore of all races, are entirely unprotected against incitement to religious hatred. Both Christians and Muslims fall into this category.[38] Small wonder that many in the Muslim community are arguing that the existing law should cover non-ethnic religious minorities. The extension of the offence to other religions disposes of the inequality problem, for how are we to take religious pluralism seriously in a multi-cultural society if we do not extend the protection of blasphemy to other faiths? It is true that such an extension will itself generate problems. For example, what is a 'religion'? Almost certainly Parliament will not make any attempt to answer a question which has been the subject of theological controversy throughout the history of modern civilisation. The test emerging from the charitable status cases seems to be predicated upon the fundamental concepts associated with Judaism, Christianity and Islam, in particular belief in and worship of a Supreme Being.[39] On the other hand, it might be feasible to formulate the question as one of fact. Again, there will be problems in distinguishing rational critique from abuse, scurrility and vilification. No doubt a different test will emerge from each religion to which the protection of blasphemy is granted. But, given the imperative to maintain parity in a democratic and multi-cultural society, there is no feasible alternative (assuming abolition of the offence does not commend itself). Indeed, once blasphemy is extended to other faiths one is bound to ask whether there is any rationale for changing the status quo at all.

In any event, is there any reason why blasphemy should not be retained and a new offence of incitement to religious hatred introduced? The paucity of prosecutions for incitement to racial hatred is unquestionably due to the requirement that there should be threatening, abusive, or insulting words or behaviour. Abdullah el Faisal would most certainly have been prosecuted for incitement to religious hatred in urging his followers to kill all unbelievers. We have noted that a rational, well-argued and properly expressed attack will escape prosecution and crude attacks will attract the full weight of the law. There is here a parallel with the common law offence of blasphemy. If incitement to religious hatred is to work, it cannot be circumscribed by the same restriction. The relative failure of the law to deal with incitement to racial hatred has prompted at least one commentator to contend that the offence should be reconstituted so as to include incitement to racial discrimination.[40] The argument is that since racially offensive material tends to incite racial discrimination (by encouraging others to treat an individual or a group of people defined by race less favourably than people from other more accepted groups) then the law should reflect this

[37] *Mandla v Dowell Lee* [1983] 2 AC 548, [1983] 1 All ER 1062, [1983] 2 WLR 620, HL.
[38] *Commission for Racial Equality v Preston Manufacturing Services Ltd* (Coit 4106/91)
[39] See the discussion in Julian Rivers 'Religious Liberty as a Collective Right in Law and Religion' in *Current Legal Issues Law and Religion*, edited by O'Dair and Lewis (Oxford University Press), p 237.
[40] Dr Peter Jepheson, *Tackling Militant Racism*, Ashgate Publishing.

reality and comprehend both language and literature which is offensive and incites racial discrimination.

Would the same approach work for a religious offence? It should be easier to prove incitement to religious discrimination than incitement to religious hate. In a democratic pluralist society it is arguable that such an offence would be legitimate. After all, there is a developed jurisprudence in the civil law relating to employment, about recognition of religious observance and the implications for discrimination, although there is not, as yet, an established redress for religious discrimination in employment since the cases have in general been associated with racial groups. The position will change when the government implements a current European directive prohibiting, inter alia, religious discrimination in employment.[41]

Finally, should religiously aggravated offences be retained in addition to a new offence of incitement to religious hatred, together with the penalty enhancement provisions? Because the courts have the power to increase sentences, where there are aggravating factors such as race or religion under section 153 of the Powers of Criminal Court (Sentencing) Act 2000, as amended, it is arguable that there would be no benefit in continuing with the substantive offence of religious aggravation.

Religious offences reflect society's values. Their purpose is to enforce those values. Unquestionably, one of the fundamental components of contemporary life in Britain is religious freedom, which has until recently been shaped by a long established practice of religious tolerance. There should be no coercion in matters of religion. The passage of the Human Rights Act 1988 implies a shift of emphasis from tolerance towards recognising the absolute nature of religious freedom. The domestic courts are called upon to guarantee the protection of religious rights and freedoms now that the European Convention on Human Rights has been incorporated into the law of the United Kingdom. However, a right of religious freedom implies freedom from scurrilous acts, which itself implies retention of the crime of blasphemy in the criminal law and indeed its extension. Giving judgment in the House of Lords during the *Gay News* case, Lord Scarman said:

> My Lords, I do not subscribe to the view that the common law offence of blasphemous libel serves no useful purpose in the modern law. On the contrary, I think there is a case for legislation extending it to protect the religious beliefs and feelings of non-Christians. The offence belongs to a group of criminal offences designed to safeguard the internal tranquillity of the Kingdom. 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.[42]

[41] See European Union Directive Establishing General Framework of Equal Treatment in Employment (27 November 2000).

[42] *Whitehouse v Lemon, Whitehouse v Gay News Ltd* [1979] AC 617 at 658, *sub nom R v Lemon, R v Gay News Ltd* [1979] 1 All ER 898 at 921, HL, per Lord Scarman.

In addition, an offence of incitement to religious hatred, if satisfactorily formulated, would contribute immeasurably to the maintenance of religious peace and reconciliation, an ideal enjoined upon us all by the Universal Declaration of Human Rights since 1948 and given effect by the jurisprudence of the European Court of Human Rights. Parliament now has an opportunity to widen and strengthen the efficient protection of religious rights and freedoms.

Reflecting upon his personal experience of the horrific tragedy in the United States on 11 September 2001, and meditating upon the feelings of powerlessness which prompted the attacks, Archbishop Rowan Williams said :

> If we are to avoid the trap of violence, we have to recognise power for what it is and is not: as what is given us for the setting free of each other, not as the satisfying of our passion for control.[43]

The report of the Select Committee on Religious Offences was duly published on 10th June 2003.[44] In regard to blasphemy the Committee examines three options:

(i) That the common law should be left as it stands. The diversity of evidence ranging from those who believe that the country should become overtly secular to those who believe that the law must offend our long established Christian character only served to reinforce the view, according to the committee, that the nature of our society is a balance between the religious, the agnostic and those of no religion so that 'no consensus seems to exist as to the direction in which the balance should be changed, if indeed change it must'. The strength of the arguments, from Muslim and Jewish as well as Christian groups, for leaving the law as it stands is acknowledged, and the committee exhorts Parliament to reflect on the protection of all faiths and all followers of faith, while recognising the need to balance freedom of expression with freedom of religion.

(ii) The repeal of the common law offence of blasphemy without replacement. The committee emphasises the discriminatory effect of the present law in protecting only Christians and that this would undermine the protective restriction on freedom of speech conferred by Article 10.2 of the European Convention on Human Rights. They contend that the retention of the offence of blasphemy would not be proportionate to a pressing social need and therefore 'necessary in a democratic society' for the purpose of balancing freedom of speech and the protection of religious rights. They speculate that a successful prosecution would be overturned on appeal on the grounds that the offence is discriminatory or on the ground that it is uncertain in its impact or even on the ground that it is a law of strict liability. On the assumption that this analysis is correct, the report canvasses the option of repeal now.

[43] Rowan Williams, *Writing in the Dust* (Hodder and Stoughton, 2002).
[44] See the Report (HL Paper 95 I) and the oral evidence (HL Paper 95 II) and the written evidence (HL Paper 95 III).

(iii) Repeal of the offence of blasphemy and replacement by a broader based Blasphemy Act.

The report emphasises that a replacement Act would have to give effect to the principle adumbrated in the Otto-Preminger case, that members of a religious group cannot expect to be exempt from all criticism and must accept denial and expressions of hostile doctrine by others, but the manner in which religious beliefs are opposed or denied may engage the responsibility of the state to ensure peaceful enjoyment of religious rights under Article 9 of the European convention.

The Home Office in its evidence did not advocate a definition of 'Religion' preferring to leave it to the Courts. The Select Committee felt that this evades the issue saying:

> Laws that have religious implications should either define or at least describe what 'religion' is.

The report acknowledges that the task of Parliament in selecting religions or beliefs rejecting religion, for protection must be fraught with difficulty, but cite the Indian Criminal Code as a starting point for a restatement of principles. The rationale of the Indian Law is the maintenance of public peace and tranquility in a country where religious passions are considered to be easily aroused and inflamed. Section 295A of the Indian Codes states:

> Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India, by words, either spoken or written, or by signs or by visible representations or otherwise, insults or attempts to insult the religion or religious beliefs of that class, shall be punished with imprisonment ...

This provision was found by the Courts to be compatible with the constitutional guarantees of freedom of religious belief and of expression. The report expresses the hope that a formulation could be found which would also comply with the European Convention.

As to incitement, the report briefly reviews the history of incitement as an offence at common law and under statute and the fact that it is not widely used by prosecutors in England and that prosecutions for example under the Race Relations Act 1965 (now found in Public Order Act 1986), for incitement to racial hatred have been relatively rare, and they record the argument that laws against inciting racial hatred often create more expectations than can be fulfilled by prosecuting authorities who do not want to give publicity to racists' utterances, less still to give them the endorsement of an acquittal.

The report devotes another chapter to freedom of expression because Articles 9 and 10 of the European Convention on Human Rights figured prominently in the deliberations of the committee and in the submissions of evidence. These Articles of course confer freedom of thought, conscience

and religion and freedom of expression subject to restriction by the state in certain circumstances (public safety, order, morals or the protection of the rights of others). The report notes that the gap between criminal incitement and permissible freedom of expression is narrow, perhaps even more so in the case of religion than of race. The report records a number of witnesses who emphasised the 'delicate balance' to be struck between incitement to hatred and protection of freedom of expression, supporting the view that prosecution should only go forward with the authority of the Attorney General. The committee noted that there was uncertainty about whether the Attorney General's refusal to consent to a prosecution was subject to judicial review and that therefore the consent to prosecution should be given by the Director of Public Prosecutions, who certainly is subject to judicial review. The report suggests that proportionality and the protection of the rights and freedoms of others indicate legislation based on vilification of a community or its faith, with a high enough threshold to allow for critical opposition, but low enough to ensure that those who abide by the beliefs under attack are not discouraged from exercising their freedom to hold and express them. The Committee admits this to be 'a difficult issue'.

In its conclusions the report finds that whilst Christianity in its many forms is still the faith followed by the large majority of the population, Britain is now a multi-faith society and, the researches of the Select Committee, together with the evidence heard, reinforce its view that religious belief continues to be a significant component, or even determinant, of social values and plays a major rôle in the lives of large numbers of the population. They believe there should be a degree of protection of faith but add 'there is no consensus among us on the precise form it might take. We also agree that in any further legislation the protection should be equally available to all faiths, through both the civil and the criminal law'.

The Select Committee reports that it examined whether there needs to be additional protection to the Human Right of thought, conscience and religion and say 'There is no consensus as to whether such protections should exist and, if so, the precise forms they should take, but we do agree that the civil and criminal law should afford the same protection to people of all faiths, and of none'.

Clearly, the task before Parliament is profoundly challenging.