Religious Convictions: The Law of Blasphemy in Ireland

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THE LAW OF BLASPHEMY IN IRELAND  

ABSTRACT  

This article examines Ireland’s blasphemy law in its historical, constitutional, and European context and analyses its interpretational difficulties. It also argues that domestic and international blasphemy laws not only fail to solve the problems of religious persecution and discrimination but also contribute to the rise of religious extremism and its concomitant human rights abuses.

I INTRODUCTION  

The offence of blasphemy is archaic. It is borne out of a jurisprudence which saw the development of events in an era where church and state were seen as a single entity. It is an offence that should be made obsolete and has been made so in other jurisdictions. It cannot be confused with the right of people to believe and to have that right respected. The difficulty in continuing to legislate in regard to an offence of blasphemy is that it is open to all sorts of reinterpretations and may be used for purposes that might not be the reasons for which those with strong religious beliefs would wish to see such an offence enshrined in legislation.¹

On 23 July 2009, Ireland’s President, Mary McAleese, signed into law the controversial Defamation Act 2009 (the Act),² criminalising the publication or utterance of blasphemous statements in the Republic of Ireland and authorising a fine not exceeding €25,000.³ The new law, which replaced the Defamation Act 1961,⁴ went into effect on 1 January 2010⁵ and was immediately opposed by the

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1 Ireland, Parliamentary Debates, Senate, July 9 2009, 196 Seanad Deb 1029 (Dan Boyle).
3 Defamation Act 2009 (Ir).
4 Section 13(1) of the Defamation Act 1961 provided:
   Every person who composes, prints or publishes any blasphemous or obscene libel shall, on conviction thereof on indictment, be liable to a fine not exceeding five hundred pounds or imprisonment for a term not exceeding two years or to both fine and imprisonment or to penal servitude for a term not exceeding seven years.
5 Defamation Act 1961 (Ir) (repealed by Defamation Act 2009 (Ir), Art 4).
   Defamation Act (Commencement) Order 2009 (Ir).
group Atheist Ireland, whose chair, Michael Nugent, published on the group’s website 25 ‘blasphemous quotations’ from famous individuals. Nugent challenged the Irish government to prosecute him, stating:

This new law is both silly and dangerous. It is silly because medieval religious laws have no place in a modern secular republic, where the criminal law should protect people and not ideas. And it is dangerous because it incentives religious outrage, and because Islamic states led by Pakistan are already using the wording of this Irish law to promote new blasphemy laws at UN level.

This legislation is puzzling on many levels. First, it was passed shortly after the common law offence of blasphemous libel was abolished in England and Wales, during a time when Western nations have been repealing such laws. Second, Ireland has recently undergone secular transformation, evidenced by the decriminalisation of homosexuality, the lift of the ban on divorce, the relaxation of Ireland’s abortion prohibition, and the recent recognition of civil partnerships.

Third, although Ireland is predominantly a Catholic nation, Article 44.2.2° of the 1937 Constitution of Ireland, Bunreacht na hÉireann, (the Constitution) expressly guarantees ‘not to endow any religion’. Finally, because incitement to religious hatred was already a criminal offence under Ireland’s Prohibition of Incitement to Hatred Act 1989, the introduction of the blasphemy offence into the 2009 Act appears to be redundant and unwarranted by any constitutional gap that could not be filled by other legislation.

To date, there have been no prosecutions under the law. After a media storm of protest, however, reports circulated that a constitutional amendment referendum could be held in autumn 2010 about whether to retain the existing prohibition.

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7 Ibid.  
8 Criminal Justice and Immigration Act 2008 (UK) c 4, s 79(1). The Blasphemy Act 1697 (Eng) 9 Will 3, c 35 had already been repealed by Criminal Law Act 1967 (UK), c 58, s 13, Schedule 4.  
11 Prohibition of Incitement to Hatred Act 1989 (Ir).  
No referendum was held, however, and the 30th Dáil was dissolved in January 2011. After the election, the Fine Gael–Labour coalition promised to establish a Constitutional Convention to consider comprehensive constitutional reform, including the removal of blasphemy from the Constitution. During this same period, the Act served as the model for the 2010 resolution by the UN Human Rights Council, condemning the ‘defamation of religion’ as a human rights violation.

This article examines Ireland’s blasphemy law in its historical, constitutional, and European context and analyses its interpretational difficulties. It also argues that domestic and international blasphemy laws not only fail to solve the problems of religious persecution and discrimination but also contribute to the rise of religious extremism and its concomitant human rights abuses.

II A BRIEF HISTORY OF IRELAND’S BLASPHEMY LAW

The Constitution is Ireland’s most important source of law. Additional sources include legislation passed by the Oireachtas, Ireland’s national Parliament, orders or statutory instruments passed by Ministers under authority delegated by the Oireachtas, judicial decisions, the European Convention on Human Rights, and European Union law.

The Constitution guarantees freedom of speech and freedom of religion, provided that these freedoms not be used to undermine public order or morality. Article 40.6.1°i further details Ireland’s only constitutional crime, stating that the

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14 ‘Election Campaign Begins After 30th Dáil is Dissolved’, The Irish Times, (online) 1 February 2011 <http://www.irishtimes.com/newspaper/breaking/2011/0201/breaking1.html>. The Oireachtas Éireann, Ireland’s national Parliament, consists of the President of Ireland and the two Houses of the Oireachtas: the Dáil Éireann (the lower house, consisting of elected representatives) and the Seanad Éireann (the upper house, consisting of both appointed and elected senators). See Houses of the Oireachtas, About the Oireachtas <http://www.oireachtas.ie/parliament/about/>.
17 Bacik, above n 9, 23.
18 Ibid.
19 Irish Constitution 1937, Art 40.6.1°I.
20 Ibid Art 44.2.3°.
21 Ibid Arts 40.6.1°I, 44.2.3°.
‘publication or utterance of blasphemous, seditious or indecent matter is an offence which shall be punishable by law’. This clause represented the framers’ belief that the protection of free speech should not be used to justify anti-religious speech.

The difficulty was the lack of constitutional or statutory definitions. The Constitution does not define blasphemous matter or identify which religions are protected from blasphemous libel. Nor was blasphemous libel defined in the Defamation Act 1961, which criminalised its composition, printing, or publication. The definitions and elements of blasphemy, therefore, had to be derived from English common law, where the crime of blasphemy had developed.

Under English common law, the crime of blasphemous libel consists of the publication of ‘material relating to the Christian religion, or its figures or formularies, so scurrilous and offensive in manner that it undermines society generally, by endangering the peace, depraving public morality, shaking the fabric of society or tending to be a cause of civil strife’. The actus reus of the common law crime consisted only of attacks on doctrines of the established Anglican

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22 Ibid Art 40.6.1°I.
24 Indeed, Irish law has not addressed the question of what constitutes a religion. Art 44.1, which requires the State to ‘respect and honour religion’, does not restrict ‘religion’ to the Catholic faith. See Quinn’s Supermarket v Attorney General [1972] 1 IR 1, 23 (finding a sabbatarian law discriminatory under Art 44.2.3° but upholding that law to sustain the free practice of the Jewish religion, as guaranteed under Art 44.2.1°).
25 Spoken blasphemy remains a common law crime. Only blasphemous libel, in written form, received statutory regulation by s 13(1) of the Defamation Act 1961 (Ir), carrying a maximum penalty of two years’ imprisonment.
27 Ireland was liberated from English rule in 1921 when the Anglo-Irish Treaty of 1921 declared the existence of the Irish Free State. Articles of Agreement for a Treaty between Great Britain and Ireland (1921) <http://www.nationalarchives.ie/topics/anglo_irish/dfaexhib2.html>. Although the legal systems of England and Ireland have been wholly separate since that time, the Irish legal system has been significantly influenced by its historical connection with England. Scott Baker, ‘Middle Temple, The Inns of Court and the Present Structure of the English Legal System’ (2006) 31 Oklahoma City University Law Review 81, 85. Ireland left the Commonwealth and acquired independence in 1948. See The Republic of Ireland Act 1948 (Ir).
28 R (on the application of Green) v The City of Westminster Magistrates Court [2007] EWHC 2785 [11] (appeal taken from Eng) (upholding the District Judge’s decision to refuse to issue summonses for blasphemous libel against the producer of a theatrical
Church that ‘contain[ed] an element of vilification, ridicule, or irreverence likely to result in a breach of the peace and so did not embrace attacks on other Christian denominations or other world religions’. The essence of this offence, then, was the protection of state interests, embodied in the constitutionally established religion of the state. Thus, the publication of Salman Rushdie’s _The Satanic Verses_ did not violate this law, although Muslims considered it blasphemous. This position on actus reus, stated by the House of Lords in _Bowman v Secular Society, Ltd_ before 1917, formed part of the law of Ireland in existence when the Constitution of the Irish Free State was enacted in 1922.

With this definition of actus reus, the House of Lords in _R. v Lemon_ (known as the ‘Gay News’ case) held in 1979 that the mens rea for blasphemy consisted of an intention to publish material which, in the jury’s view, constituted blasphemy and that it was not necessary to prove an intention to blaspheme. Accordingly, the prosecution could prove mens rea by establishing that the matter was blasphemous and the publication was intentional. The only remaining question, then, was whether these decisions formed part of the law of Ireland.

This question was resolved affirmatively in 1999, when the Irish High Court had occasion to consider the crime of blasphemy in _Corway v Independent Newspapers Ltd_ (Corway I). The case involved an article and cartoon, published in Ireland’s _Sunday Independent_ on 26 November 1995. Authored by Dr Conor Cruise O’Brien, the article was entitled ‘Catholic in Their Bones’ and opined that the recent Divorce

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31 _Bowman_, above n 29, 445.


33 _R v Lemon_ [1979] AC 617, 632. This case was brought before the European Commission on Human Rights in 1983 as _Lemon v United Kingdom_. See discussion _infra_ Part IV.


Referendum evidenced the Church’s waning influence in Ireland. The cartoon depicted a priest offering the Eucharist host to three prominent politicians who appeared to be turning away and waving goodbye. Captioned ‘Hello, Progress — Bye-Bye Father?’ the cartoon was a play upon the anti-divorce slogan used during the referendum campaign: ‘Hello, Divorce — Bye-Bye Father’.

John Corway, a Dublin carpenter, sought leave from the Irish High Court to bring a criminal prosecution against the proprietors and the editor of the Sunday Independent for blasphemous libel under s 8 of the 1961 Defamation Act. He argued that the cartoon and caption were ‘calculated to insult the feelings and religious convictions of readers generally by treating the sacrament of the Eucharist and its administration as objects of scorn and derision’. The High Court denied the order.

Writing for the Irish High Court, Geoghegan J found that the facts complained of did not amount to blasphemy, and hence no actus reus had been proved. He reasoned that, because no statutory offence of blasphemy had been created after the Constitution came into force, it was ‘safe to assume that the Oireachtas considered that the common law offences of blasphemy and blasphemous libel would have been carried over under the Constitution as not being inconsistent with it’. In other words, Bowman v. Secular Society represented the law of blasphemy in Ireland at the time, so that material in question would have to attack a tenet of Christianity in order to satisfy the actus reus. Applying this definition, the Irish High Court found that the cartoon and caption depicted the State’s unwillingness to follow church teachings rather than an attack on church doctrine. Accordingly, the actus reus of the offence of blasphemy was not satisfied by the cartoon in question.

However, Geoghegan J did state that, had there been sufficient evidence of an actus reus, he would have regarded the act of publishing sufficient to establish mens rea and would not have required evidence of a specific intention to blaspheme. Relying on R v Lemon as persuasive authority, he found that the necessary mens rea would have been present under both the majority and minority views of the House of Lords because there was both an intention to publish the cartoon and even recklessness by the respondents in permitting the cartoon to be published. That

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36 Ibid 1, 2.
37 Ibid 2.
40 Ibid 7.
41 Ibid 6.
42 Ibid.
43 Ibid 8.
44 Ibid 7.
said, he concluded that the case turned on actus reus, not mens rea, and the High Court refused to grant Corway leave to prosecute.46

Corway appealed to the Supreme Court of Ireland. In affirming the High Court’s ruling, the Supreme Court noted that the constitutional guarantees of freedom of conscience, religion, and expression cover ‘the views of citizens of all religions and of none’.47 Although the Court did not expressly define the mens rea of blasphemy, its conclusion that ‘no insult to the Blessed Sacrament was intended and that no jury could reasonably conclude that such insult existed’ seems to indicate the Court’s belief that a specific intent to blaspheme was a necessary element of the offence.48 The Court rejected Corway’s application and held that ‘[i]n the absence of any legislative definition of the constitutional offence of blasphemy, it is impossible to say of what the offence of blasphemy consists’.49 Thus, a defendant could now argue that his specific intent was not to blaspheme, but rather to communicate some other political, social, or artistic message.

The effect of the Corway decision, then, was to ‘remove blasphemy from the Constitution by silent amendment’50 and neutralise s 13(1) of the Defamation Act 1961, thereby strengthening the freedom of expression51 and religion.52 In effect, the Court held that the common law crime of blasphemy was so entangled with Christianity that it was inconsistent with Article 44’s religious equality provisions and thus had not survived the enactment of the Constitution.53 However, the Corway opinion is significant in two other respects. First, the Court left open the definition of what constitutes a religion.54 Second, the Court appeared to refer to the legislature the task of proposing an amendment that would: (1) clearly define the actus reus and the mens rea required for the crime of blasphemy; (2) expand s 13(1) of the Defamation Act, 1961 to include all religions; and (3) define the term

46 Ibid 12.
47 Corway II, above n 38, 7.
48 Ibid 40.
49 Ibid 38.
51 First Report, above n 23, 40.
52 The Court enlarged the offence of blasphemy to include non-Christian religions, based on Article 44’s guarantee to freedom of religious practice and the Fifth Amendment of the Constitution Act 1972. Corway II, above n 38, 37. According to the Court, the purpose of the Fifth Amendment was to ‘bring out the universal nature of the constitutional guarantees of freedom of religion’: ibid. The Fifth Amendment deleted Art 44.1.2–3’s recognition of ‘the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens’ and certain enumerated religions existing in Ireland at the date the Constitution came into effect: Irish Constitution 1937, Fifth Amendment of the Constitution Act 1972 (Ir)
53 See First Report, above n 23, 40.
54 Corway II, above n 38, 37 (querying the resulting position of the Muslim religion and ‘Polytheistic religions such as Hinduism’).
'religion' in accordance with Article 44's guarantee of the freedom of religious practice.\textsuperscript{55}

The next question, then, is whether the legislature achieved these goals in the Defamation Act of 2009.

III \textsc{The Defamation Act of 2009}

In 1991, even before the Corway decisions, the Law Reform Commission of Ireland (LRC)\textsuperscript{56} issued its Consultation Paper on the Crime of Libel\textsuperscript{57} and its Report on the Crime of Libel.\textsuperscript{58} Each document considered, among other matters, the changes that should be made to the law of blasphemous libel. The Commission concluded that this crime had no place in a society that respects freedom of speech, noting that any perceived gaps in the law would be adequately covered by the Prohibition of Incitement to Hatred Act 1989.\textsuperscript{59} The Commission therefore recommended that in any constitutional referendum, the part of Article 40.6.1.i that criminalises the publication or utterance of blasphemous matter should be deleted.\textsuperscript{60} The deletion of Article 40.6.1.i was also recommended in 1996 by the Constitutional Review Group\textsuperscript{61} and again in 2008 by the Joint Oireachtas Committee on the Constitution in its report on Article 40.6.1.i and the Freedom of Expression.\textsuperscript{62}

Pending such constitutional reform, or in the event this recommendation were to be rejected, the LRC recommended abolishing the common law offence of blasphemous libel and replacing it with a new offence entitled 'publication of blasphemous matter'.\textsuperscript{63} The remaining recommendations dealt with this new offence.

First, the LRC recommended defining blasphemous matter as 'matter the sole effect of which is likely to cause outrage to a substantial number of the adherents

\begin{itemize}
\item \textsuperscript{55} O'Brien, above n 9, 427.
\item \textsuperscript{56} The Commission is an independent body established under the Law Reform Commission Act 1975 (Ir). See Law Reform Commission <http://www.lawreform.ie/>.
\item \textsuperscript{59} Ibid 10. This Act criminalises the publication of material designed to stir up ‘hatred against a group of persons in the State or elsewhere on account of their … religion …’ Prohibition of Incitement to Hatred Act 1989 (Ir).
\item \textsuperscript{60} LRC Libel Report, December 1991, above n 58, 11, 14.
\item \textsuperscript{62} First Report, above n 23, 40.
\item \textsuperscript{63} LRC Libel Report, above n 58, 11.
\end{itemize}
of any religion by virtue of its insulting content concerning matters held sacred by that religion’. Thus, blasphemous matter would exclude ‘mixed’ matter, which is a ‘serious literary achievement’ or which primarily aims to contribute to public discussion but ‘incidentally insults or offends’ because ‘the speaker uses strong terms to expose what he perceives to be the flaws of a religion’.

Second, the LRC recommended redefining the actus reus as ‘publication of matter the effect of which is likely to cause outrage to a substantial number of the adherents to a religion by reason of its insulting content concerning matters held sacred by that religion’. The term ‘religion’ in turn should include Christian and non-Christian religions. The phrase ‘matters held sacred’ should exclude criminal acts. ‘Publication’ should include publication by any means, including but not limited to ‘broadcasting by wireless telegraphy’.

Third, as to the mens rea, the LRC recommended requiring the prosecution to show not only that the defendant ‘knew the matter was likely to outrage the adherents of any religion’ but also that the defendant’s ‘sole intent was to outrage the adherents of any religion’. In making this recommendation, the LRC reasoned that individuals should not be criminally liable if they are unaware that a matter is offensive to a particular religion because they are ignorant of the tenets of that religion. This two-tiered mens rea requirement would ‘render it unnecessary to provide a defence for distributors or printers, or broadcasters of live programmes’. Finally, for purposes of clarity, the LRC also recommended abolishing the doctrine of vicarious liability with respect to this new offence and amending s 7(2) of the Censorship of Films Act 1923 to define blasphemy in similar terms.

These recommendations languished. Eight years later the Corway ruling, that the crime of blasphemy was unenforceable, left the Oireachtas with two options: either define blasphemy in new legislation or hold a referendum to delete the reference to blasphemy in the Constitution.

No constitutional referendum was held. Instead, using some of the LRC’s recommendations, the Defamation Act of 2009 was passed. The Act clearly criminalises the publication or utterance of blasphemous matter. Section 36 states:

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64 Ibid 11.
65 LRC Libel Paper, above n 57, 174.
66 LRC Libel Report, above n 58, 11.
67 Ibid 11, 15.
68 Ibid 11–12.
69 Ibid 12.
70 Ibid.
71 LRC Libel Paper, above n 57, 176.
72 Ibid.
73 Ibid.
74 Ibid.
(1) A person who publishes or utters blasphemous matter shall be guilty of an offence and shall be liable upon conviction on indictment to a fine not exceeding €25,000.

(2) For the purposes of this section, a person publishes or utters blasphemous matter if—

(a) he or she publishes or utters matter that is grossly abusive or insulting in relation to matters held sacred by any religion, thereby causing outrage among a substantial number of the adherents of that religion, and

(b) he or she intends, by the publication or utterance of the matter concerned, to cause such outrage.

(3) It shall be a defence to proceedings for an offence under this section for the defendant to prove that a reasonable person would find genuine literary, artistic, political, scientific, or academic value in the matter to which the offence relates.

(4) In this section ‘religion’ does not include an organisation or cult—

(a) the principal object of which is the making of profit, or

(b) that employs oppressive psychological manipulation—

(i) of its followers, or

(ii) for the purpose of gaining new followers.  

Section 36 of the Act is subject to attack on several grounds, beginning with vagueness. Section 36(2)(a), which sets out the actus reus of the offence, lacks the specificity that persons of ordinary intelligence require in order to regulate their conduct. It uses the term ‘matter’ twice, one in the singular and once in the plural, without ever defining it. In other words, the prohibited conduct is the publication or utterance of ‘matter’ that grossly abuses or insults other ‘matter’. Moreover, there is no clear guideline on how to measure the impact of gross abuse or insult on ‘outrage’. Matters held sacred by one religion may offend adherents of another religion. Indeed, such differences of opinion may occur even within a religion. This is complicated further by the lack of a definition of the term ‘adherent’. Does it refer to the hypothetical average worshipper or only to the most zealous believers? Moreover, what is a ‘substantial number’ of adherents? Finally, although the LRC recommended defining the phrase ‘matters held sacred’ to exclude criminal acts, s

75 Defamation Act 2009 (Ir) s76.


77 ‘[W]ith the proliferation of the Internet we know how quickly substantial numbers of people might be offended and feel grossly abused or insulted.’ Ireland, Parliamentary Debates, Senate, July 9 2009, 196 Seanad Deb 1027 (Ivana Bracik. ‘Is it 20 people? If there are 20 people in the Gallery, that is a substantial number. Is a substantial number 100 or 1,000 people? We need that clarified.’ Ireland, Parliamentary Debates, Senate, July 9 2009, 196 Seanad Deb 1030–31 (Dominic Hannigan).

78 LRC Libel Report, above n 58, 15.
36(2)(a) contains no such limitation. Can one infer, then, that this provision protects even religious beliefs in criminal acts such as human sacrifice?\(^{79}\)

Section 36(2)(b) sets out the mens rea of the offence in terms that reject all of the LRC’s recommendations. The section requires only that the defendant intended ‘by the publication or utterance of the matter concerned, to cause such outrage’; it makes no statement about vicarious liability, sole intent to outrage, or knowledge that outrage is likely.\(^{80}\) Given the definition of the actus reus, however, the end effect may be the same. Because individuals cannot recognise all ‘matters’ that ‘any’ religion holds sacred, they cannot be found to have intended ‘such outrage’.\(^{81}\) Thus, under s 36(2), if a person publishes or utters insulting or abusive matter without knowing that it would offend adherents of a particular religion, he or she lacks the requisite criminal intent. It is unclear, however, whether the requisite mens rea will be satisfied if the defendant is merely reckless as to whether the blasphemous matter will cause outrage.

Regardless of the intention to cause outrage, s 36(3) provides a defence if the defendant proves that ‘a reasonable person would find genuine literary, artistic, political, scientific, or academic value in the matter to which the offence relates’. However, not all types of public discussion are included in this ‘genuine value’ defence. Notably, this defence excludes public discussion that has religious value, even if a reasonable person would find genuine religious value in the offending matter. This omission led Senator Rónán Mullen to make the following comments about what he called ‘aggressive secularism’:

> Here lies the great irony: in legislation which is designed to offer some protection to people of whatever faith, the Minister has included a bulwark against that protection to every category imaginable except the person of faith, despite the fact that it is most likely to be in matters of religion, through utterances of people of religion, including ministers or officials of religion, that the offence might be given … It is in debates between religions that controversy is most likely to arise.\(^{82}\)

It is not clear from a reading of s 36(3), which references ‘the matter to which the offence relates’, whether the genuine value defence applies to the entire publication or utterance or only to the words or phrases constituting abuse or insult. Once genuine value is proved to exist, however, the protection is absolute. Nothing

\(^{79}\) In fact, in its Consultation Paper, the LRC stated: ‘Therefore if a particular sect advocated human sacrifice, it could not argue that insults directed at this activity constituted an attack on a matter held sacred by them.’ LRC Libel Paper, above n 57, 174.

\(^{80}\) See discussion below Part III.

\(^{81}\) Ireland, \textit{Parliamentary Debates}, Senate, July 9 2009, 196 Seanad Deb 1050 (Dermot Ahern).

\(^{82}\) Ireland, \textit{Parliamentary Debates}, Senate, July 9 2009, 196 Seanad Deb 1035 (Rónán Mullen).
in s 36(3) requires the court to balance this value against the outrage caused to adherents of a religion.

Nevertheless, as Senator Mullen pointed out, by targeting expression that causes outrage against any religion, without exempting expression that has religious value, the legislation restricts religious speech that offends other religions. In so doing, it constitutes an unjustified interference in the free exercise of religion, contrary to Article 44 of the Constitution.

These flaws in the Act may not matter in the end and in fact may have been deliberate or at least deliberately ignored. During the Parliamentary Debates on July 9, 2009, Minister of Justice Dermot Ahern stated that the legislation had been drafted to ‘make it virtually impossible to get a successful prosecution [for blasphemy] out of it’. This appears to be an accurate conclusion, given that s 36 of the 2009 Act requires the offender to intend to cause outrage, to succeed in causing outrage, and to have no genuine value defence. Ahern made it clear that the Act was necessary not to cure some great societal evil but rather to satisfy the mandate in Article 40.1.1° of the Constitution that the ‘publication or utterance of blasphemous, seditious or indecent matter is an offence which shall be punishable by law’. As Ahern explained the problem, the Supreme Court in Corway v. Independent Newspapers held that the common law offence of blasphemous libel had not survived the adoption of the Constitution. Section 13 of the 1961 Defamation Act, which purported to fill the gap, was then rendered ineffective, and Article 40.1.1° obligated the Oireachtas to enact new blasphemy legislation.

In light of Article 40.1.1° of the Constitution, then, legislative repeal of Ireland’s blasphemy law would be unconstitutional without constitutional amendment.

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83 Ibid.
84 Of course, the presumption of constitutionality may save s 36(3). In Ireland, an Act of Parliament enjoys the presumption of constitutionality. McDonald v Bord na gCon (No. 2) [1965] IR 217, 340. Under the ‘double construction rule’, if two or more constructions of a statutory provision are reasonable but only one conforms to the Constitution, it is presumed, as a matter of statutory interpretation, that Parliament intended only the conforming construction: ibid 239.
85 Ireland, Parliamentary Debates, Senate, July 9 2009, 196 Seanad Deb 1017–9 (Dermot Ahern).
87 Ireland, Parliamentary Debates, Senate, July 9 2009, 196 Seanad Deb 1019 (Dermot Ahern).
88 Irish Constitution 1937, Art 40.6.1°i.
89 Ireland, Parliamentary Debates, Senate, July 9 2009, 196 Seanad Deb 1017–9 (Dermot Ahern).
90 Corway II, above n 38.
91 The deletion of Art 40.1.1° was recommended in 1991 by the Law Reform Commission, see LRC Libel Report, above n 57, 11; in 1996 by the Constitutional Review Group, see CRG Report, above n 61; and again in 2008 by the Joint
other words, until the Constitution is amended through a referendum, blasphemy must remain a crime in modern Ireland.

**IV FREEDOM OF EXPRESSION AND IRELAND’S EUROPEAN OBLIGATIONS**

Freedom of expression in Ireland is guaranteed in Article 40.6.1°i of the Constitution, ‘subject to public order and morality’. In its report published May 1996, the Constitution Review Group was of the opinion that Article 40.6.1°i was unsatisfactory as drafted and too heavily circumscribed. The Group’s 1996 report recommended that this article be replaced by a new clause modelled on Article 10 of the European Convention of Human Rights (the Convention).

The Convention guarantees a range of human rights to citizens of member countries of the European Union, including Ireland. Article 9 protects the rights of freedom of thought, conscience, and religion, and Article 10 protects freedom of expression. Article 1 of the Convention requires signatory parties to secure rights under the Convention ‘within their jurisdiction’. In other words, each signatory party must conform its laws and policies to the Convention. Ireland’s solution was to use interpretative incorporation of the Convention into its domestic laws through the European Convention on Human Rights Act 2003 (ECHR Act).

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92 This restriction is repeated in Art 40.6.1°i, stating, ‘the State shall endeavour to ensure that organs of public opinion … shall not be used to undermine public order or morality or the authority of the State’.


94 Ibid 301.

95 Art 9(1) of the Convention states: ‘Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.’ Art 9(2) states: ‘Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society …’

96 Art 10(1) of the Convention states: ‘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 broadcasting, television or cinema enterprises.’

recommended by the 1996 Constitution Review Group,\textsuperscript{98} Art 10 of the Convention became part of Irish law, subject to those exceptions named in Article 10(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 the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

However, Art 10 of the ECHR Act did not replace Article 40.6.1°.i of the Constitution. The question for Ireland, then, is how to harmonise the two provisions.

Section 2(1) of the ECHR Act requires that, subject to the existing rules of statutory interpretation, Irish courts should apply statutes and laws so that they are compatible with the Convention insofar as possible. Section 4 provides that ‘judicial notice’ shall be taken of the Convention provisions and of any declaration, decision, advisory opinion, judgment of the European Court of Human Rights (the European Court), the European Commission of Human Rights (the Commission), and the Committee of Ministers. Accordingly, the jurisprudence of the Commission and the European Court can be raised in all domestic courts.

However, while the Convention and its jurisprudence are now deemed part of Ireland’s domestic law, the Act itself contains two significant qualifications. First, the full title of Ireland’s ECHR Act is self-limiting and merely allows ‘further effect’ to be given to the Convention.\textsuperscript{99} Second, the preamble states that the Convention remains ‘subject to the Constitution’. Thus, if Ireland’s courts are unable to apply statutes and laws in a manner compatible with the Convention, Irish law will prevail.

This may not be a problem for the Defamation Act of 2009. Collectively, the jurisprudence of the European Court of Human Rights holds that interference with Article 10’s right to freedom of expression may be justified if the impugned measure: (1) is prescribed by law; (2) pursues one of the legitimate aims enunciated in the Convention, including the prevention of disorder or crime, the protection of health or morals, and the protection of the rights of others; (3) is necessary in a democratic society; and (4) is proportionate to the legitimate aims pursued under

\textsuperscript{98} CRG Report 1996, above n 61.

the Convention. The European Court has consistently upheld the application of domestic blasphemy laws against challenges that these laws violate the Convention.

The first in this line of cases was *Lemon v United Kingdom*.

Both the publisher and the editor of the magazine *Gay News* were convicted of blasphemous libel in the UK after the magazine published a poem describing the alleged homosexual practices of Jesus Christ. After exhausting their appeals in England, they applied to the European Commission of Human Rights (the Commission), which deemed the application inadmissible.

The Commission first determined that the primary purpose of the English common law offence of blasphemous libel had a legitimate aim, which was ‘to protect the rights of citizens not to be offended in their religious feelings by publications’. It followed, then, that a restriction on the applicants’ right to freedom of expression for this purpose was ‘necessary in a democratic society’, provided the restriction was proportionate to the severity of the harm it seeks to avoid.

This view was reinforced in subsequent decisions that protect religious sentiments when they become the target of offensive speech. In 1995, the European Court decided the case of *Otto-Preminger-Institut v Austria*, in which the manager of a non-profit cinema, OPI, was charged with the criminal offence of disparaging religious beliefs, based on the content of a film containing offensive characterisations of God, Jesus, and Mary. The film was seized before it could be screened in the predominantly Catholic Tyrol region. Rejecting OPI’s application, the Court found that the impugned measures had a legitimate aim because the offensive portrayals in the film had violated the respect for the religious feelings of believers guaranteed in Article 9. Deciding next that interference with OPI’s Article 10 rights was necessary in a democratic society, the Court referred to the ‘duties and responsibilities’ of those who exercise the rights and freedoms enshrined in Article 10. These, the Court said, include a duty to avoid antireligious speech that is gratuitously offensive to others, infringes their rights, and ‘does not contribute to any public debate capable of furthering progress in human affairs’. Finally, the Court found that the seizure of the film was proportionate to the legitimate aim pursued. The Court famously observed that because it is impossible to discern a uniform European view of the significance of religion in society, it is similarly impossible to devise ‘a comprehensive definition of what constitutes a permissible interference with the exercise of the right to

102 Ibid 128.
103 *Lemon v United Kingdom* 5 Eur Ct HR 130.
104 Ibid 130.
106 Ibid 37.
107 Ibid 47.
108 Ibid 49.
109 Ibid 49.
110 *Otto-Preminger-Institut*, 19 Eur Ct HR 57.
freedom of expression where such expression is directed against the religious feelings of others'. Accordingly, '[a] certain margin of appreciation is therefore to be left to the national authorities in assessing the existence and extent of the necessity of such interference' against this newly recognised right of believers not to be insulted in their religious feelings.

In *Wingrove v United Kingdom*, the European Court avoided equating ‘respect for the religious feelings of believers’ with Art 9 guarantees, as it had done in the *Otto-Preminger-Institut* decision. Wingrove had submitted a film called ‘Visions of Ecstasy’ to the British Board of Film Classification, which refused to issue a censors certificate on the ground that the content of the film, erotic portrayals of St Teresa of Avila, was blasphemous. Wingrove argued that the refusal of a certificate violated his right to freedom of expression under Article 10 but the Court disagreed. In the Court’s view, Wingrove should have reasonably foreseen that his work would be restricted under England’s blasphemy laws. Moreover, the restriction pursued the legitimate aim of protecting a religious subject from being treated in a manner that was bound ‘to outrage those who have an understanding of, sympathy towards and support for the Christian story and ethic, because of the contemptuous, reviling, insulting, scurrilous or ludicrous tone, style and spirit in which the subject is presented’. Finally, the Court could find no common legal ground among the member states to determine that blasphemy laws were unnecessary in a democratic society and incompatible with the Convention. As a result, a wider ‘margin of appreciation’ had to be reserved to the national authorities to evaluate the necessity of the restrictions on free expression and to determine how to protect their citizens from attacks on their religious beliefs. In this case, because the film amounted to an insulting and offensive assault on the religious beliefs of Christians, the refusal of a classification certificate was within the State’s margin of appreciation under Article 10. Moreover, the interference was consistent with Art 9’s goal of protecting religious freedom and was not more than necessary in a democratic society to protect this aim.

In the 2003 case of, *Murphy v Ireland*, however, the European Court once again obscured the distinction between Arts. 9 and 10 when it upheld a ban on religious advertising which was likely to offend the religious beliefs of others. The issue before the Court related to Ireland’s prohibition of religious advertising in commercial radio and television. The applicant was a pastor of a Christian minority

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111 Ibid 57–8.
112 Ibid 58.
114 See *Otto-Preminger-Institut*, 19 Eur Ct HR 49.
116 Ibid 15.
117 Ibid 30–1.
118 Ibid 38.
119 Ibid 63.
120 Ibid 21.
church. The Independent Radio and Television Commission (IRTC) had banned his proposed advertisement, which invited listeners to attend a public showing of a video detailing the evidence of the resurrection of Christ. The IRTC’s reason for the ban was that the advertisement violated the Radio and Television Act 1988’s prohibition against advertisements directed toward any religious end. The European Court upheld the ban as a legitimate restriction on his freedom of expression under Article 10.122

Although the impugned regulation was not aimed at opposition to or disparagement of religious doctrine or objects of religious veneration, the Court nevertheless found that its goals, which were public order, safety, and the protection of the rights and freedoms of others, were legitimate for the purposes of Article 10.123 Turning then to the question whether the ban could be considered ‘necessary in a democratic society’, the Court found that, in regulating religious advertising in the audio-visual media, the Irish government had not gone beyond its margin of appreciation in regulating expression ‘in relation to matters likely to offend personal convictions in the sphere of morals and religion’.124 The question, then, was whether the restriction corresponded to a ‘pressing social need’ and whether it was ‘proportionate to the legitimate aim pursued’.125 In upholding the administrative prohibition, the Court considered three factors. First, because the prohibition concerned only the audio-visual media, the applicant was free to advertise the same matter in any of the print media.126 Second, the prohibition related only to paid religious advertising, not to the content of broadcasts of religious programming.127 Third, given Ireland’s divisive religious history, it was not unreasonable for the government to prohibit religious advertising that could create unnecessary social tension.128

More recently, in 2005, the European Court upheld a prosecution for blasphemy in Turkey.129 In I.A. v. Turkey, the applicant was a book publisher who was charged under Article 175 of Turkey’s Criminal Code with blasphemy against ‘God, the Religion, the Prophet and the Holy Book’. The charges were based on his publication of a novel that described the prophet Muhammad as having sexual intercourse with dead people and live animals. The domestic courts fined the publisher on the ground that the book contained expressions intended to vilify and blaspheme Islam. The European Court characterised the conflict as a collision of two fundamental freedoms, ‘namely the right of the applicant to impart to the public his views on religious doctrine, on the one hand, and the right of others to respect for freedom of thought, conscience and religion, on the other hand’.130

122 Ibid 233.
123 Ibid.
124 Ibid 234.
125 Ibid.
126 Murphy 38 Eur HR Rep 236.
127 Ibid.
128 Ibid.
129 IA v Turkey, 2005-VIII Eur Ct HR 249.
130 Ibid.
Declaring that the book was ‘an abusive attack on the Prophet of Islam’, the Court upheld the fine as proportionate to the legitimate aims of preventing disorder and protecting against offensive attacks on matters regarded as sacred by Muslims. For the same reason, Court found that the blasphemy law was a reasonable measure meeting a ‘pressing social need’.

This, then, is the European backdrop for the Act. The European Court’s jurisprudence holds that Article 10 of the Convention is not violated by the existence of a criminal law against blasphemy, provided the restriction on expression is justified by a protection of the religious freedom of the adherents to the majority religion and is proportionate to this goal. It is likely that the prohibition against blasphemous libel in the Act would be seen by the European Court as justified based on the potential of blasphemy to cause outrage among and offence to a substantial number of religious believers.

V A SHORT STEP FROM BLASPHEMY TO DEFAMATION OF RELIGION

Ireland’s Defamation Act of 2009 appears to have been passed to satisfy a constitutional mandate while simultaneously ensuring the impossibility of a successful prosecution. If the matter ended there, the legislation might become a curious and unused relic of a bygone era.

In this case, however, the matter is larger than Ireland and its history of religious conflict. The Act itself served as the inspiration for Pakistan’s most recent successful attempt in 2010, on behalf of the Organisation of Islamic Conference, to persuade the UN Human Rights Council in Geneva to condemn the ‘defamation of religion’ as a human rights violation. Indeed, the irony is that in explicitly protecting ‘matters held sacred by any religion’, the Defamation Act of 2009 closely resembles the UN defamation of religion resolutions that Ireland has always opposed as inconsistent with ‘the promotion and protection of human rights’. These resolutions are widely seen as providing international legitimacy for domestic blasphemy laws that are used to silence religious minorities and dissenters and that frequently result in human rights violations.

131 Ibid.
132 Ibid.
133 Ibid.
134 Above n 86.
The international community has long been committed to protecting the rights of individuals to the freedom of opinion, expression, and religion. These rights have been enshrined in the Universal Declaration of Human Rights\[138\] and the International Covenant on Civil and Political Rights (ICCPR)\[139\] in nearly identical terms, though with little guidance on what should transpire when they collide, as they have done in recent years. Specifically, the question is whether the right to freedom of expression, as stated in Article 19 of the ICCPR, is at odds with Article 20’s prohibition of ‘advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence’.

Since 1999, the right to freedom of expression has been under continued attack in resolutions adopted by the UN Human Rights Council to combat the ‘defamation of religion’. The Defamation of Religion resolution that was passed in 2010 declared that ‘vilification of religions is a serious affront to human dignity leading to the illicit restriction of the freedom of religion of their adherents and incitement to religious hatred and violence’, adding that ‘Islam is frequently and wrongly associated with human rights violations and terrorism’.\[140\] The resolution called on states ‘to adopt necessary measures … to prohibit the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence …’\[141\]

Opponents pointed out that these resolutions protected communities, concepts, and beliefs over individual human rights, in turn jeopardising the individual right to freedom of expression, including freedom of religious expression.\[142\] Various secular, religious, and media groups worldwide expressed the fear that the resolution could be ‘used in certain countries to silence and intimidate human rights activists, religious dissenters and other independent voices’ and ultimately restrict freedoms.\[143\]

These fears were borne out by two recent assassinations in Pakistan. In January 2011, Salmaan Taseer, Governor of the Punjab, was killed for denouncing the treatment of Asia Bibi, a Christian wife and mother, who was sentenced to death by hanging for defaming the prophet Muhammad during an argument with Muslim women who refused to drink her water.\[144\] Taseer, her defender and a vocal critic of\[138\] Universal Declaration of Human Rights, GA Res 217A, UN GAOR, 3d Sess, 1st plen mtg, UN Doc A/810 (December 12, 1948), Art 19.\[139\] International Covenant on Civil and Political Rights, GA res 2200A (XXI), 21 UN GAOR Supp No 16 at 52, UN Doc A/6316 (1966), 999 UNTS 171, (March 23, 1976) [ICCPR].\[140\] GA Res 65/224, UN Doc A/RES/65/224 (December 21, 2010).\[141\] Ibid.\[142\] National Secular Society, Defamation of Religion Passes at UN Human Rights Council Again, (27 March 2009) <http://www.secularism.org.uk/108265.html>.\[143\] Ibid.\[144\] Tom Wright, ‘Leading Pakistani Politician Killed’, Wall Street Journal, (online) 3 January 2011 <http://online.wsj.com/article/SB10001424052748704723104576061>
Pakistan’s blasphemy laws, was killed by his bodyguard, who has since been hailed as a hero.\textsuperscript{145} Not long afterward, Shahbaz Bhatti, the federal Minister for Minority Affairs and Pakistan’s only Christian government minister, was gunned down after receiving death threats for urging reform to the country’s blasphemy laws.\textsuperscript{146}

For many, the most disturbing aspect of these tragedies was the public expression of support for, and even celebration of, the violence. By late March 2011, with the support of the Organization of Islamic Conference, the UN Human Rights Council had eliminated the concept of defamation of religions and all direct references to Islam in a resolution on combating religious intolerance.\textsuperscript{147} Instead, the 24 March 2011 resolution expresses concern at the increase in acts of violence against religious minorities, as well as ‘[t]he rise of religious extremism in various parts of the world that affects the rights of individuals and persons belonging to religious minorities’.\textsuperscript{148} It also condemns advocacy of religious hatred that amounts to incitement to discrimination, hostility, or violence, and calls on States to act to prevent such advocacy, pointing out that the failure to do so may constitute a human rights violation.\textsuperscript{149} This recent reversal signifies recognition that blasphemy laws have done little to combat religious intolerance and much to embolden extremists.

VI Conclusion

With the exception of Ireland, the Western trend has been to repeal blasphemy laws. Muslim states have moved in the opposite direction, however, leading to allegations of miscarriages of justice and the exacerbation of ‘a growing environment of dogma and intolerance — spawning a culture of extremism and violence’.\textsuperscript{150} In addition to Asia Bibi’s death sentence and the assassinations of Taseer and Bhatti, the United States Department of State has reported that blasphemy laws are routinely used by Pakistani authorities ‘to harass religious minorities and vulnerable Muslims and to settle personal scores or business

\begin{thebibliography}{9}
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\bibitem{146} Haris Anwar and James Rupert, ‘Shahbaz Bhatti, Pakistan’s Minorities Minister, Assassinated by Gunmen’, The Washington Post (online) 2 March 2011 <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/02/AR2011030204545.html>.
\bibitem{148} UN Doc A/HRC/16/L.14 (March 24, 2011).
\bibitem{149} Ibid.
\end{thebibliography}
rivalries’. With the use of Ireland’s new blasphemy law as a model for international adoption of defamation of religion laws, it is perhaps time for the Irish voters to rethink the social and political costs of Article 40.6.1°I of the Constitution of Ireland.

In his recent work, *The Ethical Case for a Blasphemy Law*, Neville Cox argues that, in order for the interests of those offended by blasphemy to trump the blasphemer’s right to freedom of expression, the relevant material should ‘[transcend] legal acceptability’ by offending not only individuals but also ‘the collective conscience of the nation as a whole’.

By way of analogy, he maintains that blasphemy should not constitute a criminal offence unless it ‘pierce[s] the soul of a nation’ in the way that holocaust denial did to Germany or Salman Rushdie’s *The Satanic Verses* and the Danish cartoons in *Jyllands Posten* did to Muslims worldwide.

While the crime of blasphemy may have pierced Ireland’s Catholic soul in 1937, when the Constitution was written, blasphemy in today’s secular Ireland is unlikely to have that effect on any group of adherents in that country. Moreover, if Irish voters elect to remove Article 40.6.1°I from the constitution, the new coalition government will be free to repeal the Defamation Act of 2009 and turn its attention to legislative measures that combat religious violence and discrimination without unduly restricting speech.

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153 Ibid 275.