

# Submission from Atheist Ireland to Constitutional Convention on Removing the Offence of Blasphemy



## 1. Executive summary

1. Atheist Ireland is an advocacy group for atheism, reason and ethical secularism. We are participants in the dialogue process between the Government and religious and philosophical bodies. We campaign internationally against the use of blasphemy laws to infringe the human rights of religious minorities and atheists, including by hosting an event at the 2012 OSCE human rights meeting in Warsaw. We have opposed the Irish blasphemy law since it was first announced, including by lobbying Irish politicians and international regulatory bodies.

2. We argue that blasphemy laws generally are harmful for three reasons:

- (a) They endanger freedom of speech and deny equality.
- (b) They are used to infringe on human rights around the world.
- (c) They have been condemned by reputable international bodies.

3. We argue that the Irish blasphemy law in particular is harmful for three reasons:

- (a) It reinforces the religious ethos of the 1937 Constitution.
- (b) It brings our parliament and our laws into disrepute.
- (c) Islamic states use it at the UN to promote universal blasphemy laws.

Professor Heiner Bielefeldt, United Nations Special Rapporteur on Freedom of Religion, advised us as we prepared this submission:

“Of course you are right that the major damage done by this legislation is the international one. I wouldn’t expect any harsh verdicts being handed down in Ireland, but those countries that continue to have an intimidating anti-blasphemy practice like to quote European countries to unmask Western hypocrisy. So I hope things will be moving in the right direction. One can also cite General Comment no. 34 of the Human Rights Committee and the Rabat Plan of Action. Both documents call upon States to move away from criminalizing so called blasphemy.”

4. Summary and recommendations

- (a) Many Irish bodies have already recommended removing the offence of blasphemy.
- (b) We ask the Convention to recommend the following:
  - (i) Remove the offence of blasphemy from Article 40.6.1 of the Constitution.
  - (ii) Revise Article 40.6.1 generally, modeled on Article 10 of the European Convention of Human Rights.
  - (iii) Include in the revised Article a clause prohibiting laws against blasphemy.
  - (iv) Consider the inter-related impact of the blasphemy clause and other religiously-inspired aspects of the Constitution.

## **2. Why blasphemy laws generally are harmful**

### **2(a) Blasphemy laws endanger freedom of speech and deny equality**

- (i) Blasphemy laws are arguably against Article 14 of the European Convention on Human Rights. This was recognised by the UK House of Lords Select Committee on Religious Offences (2003)
- (ii) Blasphemy laws are known to have a universal 'chilling effect' upon normal freedom of expression.
- (iii) The law of blasphemy is a class discriminatory law (as many blasphemy laws which focus upon the act and function of expression are) since it creates provisions whereby a skilled and educated debater stands far less chance of prosecution than a less educated individual in a non-academic context.
- (iv) Blasphemy law is a species of libel with no real rules of evidence or proof. Likewise it is an offence for which the mens rea assumptions of guilt are, and always have been, very difficult to establish.
- (v) An inclusive blasphemy law, which Ireland's law seeks to be, has been historically shown to be inadequate for protecting religious beliefs in conflict with one another.
- (vi) The legal criterion for recognition as a religious group, within laws not protecting a specific established church, are problematic and poorly defined.
- (vii) It is possible that an extended blasphemy law potentially enshrines religious protection for the act of blasphemy, and does not protect society from its ramifications.

### **2(b) Blasphemy laws are used to infringe on human rights around the world**

- (i) Some examples from recent years: Asia Bibi, a Christian mother, is facing execution in Pakistan for comparing Jesus with Mohammad, and two politicians were assassinated for speaking out on her behalf. Rimsha Masih, a 14 year old Christian girl with special needs, was charged with blasphemy in Pakistan after a Muslim cleric planted burnt pages of the Quran as evidence against her. Mirza Alfath, a Muslim law lecturer, was arrested in Indonesia for criticising the modern use of Sharia Law. Hamza Kashgari, a Muslim poet, was extradited from Malaysia and jailed in Saudi Arabia after tweeting that he would shake hands with Mohammad as an equal. Alexander Aan, an atheist civil servant, was jailed in Indonesia after writing on Facebook that God does not exist. Sanal Edamaruku, a rationalist writer, is facing blasphemy charges in India for exposing that a 'miraculous' weeping holy statue was caused by faulty plumbing.
- (ii) Blasphemy laws breach accepted human rights standards  
Pakistan - Section 15 of the Penal Code breaches Article 19 of the Universal Declaration of Human Rights; Poland – Article 196 of the Penal Code conflicts with accepted standards of freedom of expression and has been criticised by the Venice Commission.
- (iii) Blasphemy frequently leads to arbitrary arrest, detention, poor treatment in custody (including torture), dubious legal procedures and poor application of justice  
Greece, Poland, Algeria (prison sentences of varying length, failure of due process in trials, trials in absentia); Indonesia (longer prison sentences); Sudan (corporal punishment); Egypt (torture) Pakistan, Saudi Arabia (capital punishment). This is

incompatible with UN guidelines on the use of the death penalty (UN Human Rights Committee's General Comment 6); Pakistan (arbitrary detention contrary to the Universal Declaration of Human Rights).

- (iv) Blasphemy laws in action in other countries in the last 3 years  
Bangladesh (three incidents), Pakistan (eighteen incidents) Saudi Arabia (three incidents), Kuwait (one incident), Iran (two incidents), Turkey (four incidents), Egypt (three incidents), India (four incidents).
- (v) Arbitrary and discretionary nature of such laws  
Pakistan – definition of the offence in the hands of police and judicial authorities.
- (vi) Governments Silencing political opponents  
Egypt - bloggers prosecuted under Article 98 (f) of the Egyptian Penal Code. Violation of human rights in this case was highlighted by the UN Working Group on Arbitrary Detention. Malaysia - journalist detained under the 1960 Internal Security Act.
- (vii) Individuals fabricating charges against others in communal disputes  
Pakistan - (blasphemy has been the pretext for settling land disputes – as accusations of witchcraft did in seventeenth century Europe and America).
- (viii) Religious extremists using blasphemy laws to attack opponents  
Pakistan - (principle of Hisba has been used to police non observance of religious practices); Egypt - (principle of Hisba has been used to police non observance of religious practices – accepted as a precedent in court); Algeria - (laws used against Christian Commentators); Malaysia– prosecution of Non-Sunni Muslims and other groups not listed as religions acceptable to the state.
- (ix) Preferential protection for one religion  
Algeria, Malaysia – protection of Sunni Islamic faith but failure to protect the religious rights of Catholics.
- (x) Religious authorities have used blasphemy laws to impose religious orthodoxy on members of religious groups with the sanction of the state  
Pakistan – of those accused of blasphemy in this country half of these come from the 3 per cent of the population that are the smallest religious minorities; Algerian Penal Code Article 144 bis 2 used against failure to practice in an orthodox manner. Penalty of five years imprisonment and a considerable fine. This has been found to not comply with international human rights standards, although Algeria subscribes to the ICCPR and other human rights conventions; Indonesia Article 156 (A) of the Penal Code has been used against branches of Islam that are considered unorthodox.
- (xi) Unofficial action by individuals  
Nigeria, Indonesia, Pakistan (violence by mobs).

## **2(c) Blasphemy laws have been condemned by reputable international bodies**

- (i) International law requires that any legal trigger in hate speech laws should be at an acceptably high level so that their intention is to prevent acts of violence rather than to supervise culture.
- (ii) Since 2011 the Human Rights Committee of the United Nations has considered laws against blasphemy and religious defamation as constituting violations of international law and has generally asked for their removal.

- (iii) The ICCPR considers blasphemy and religious defamation laws as contrary to human rights and constituting violations of international law. Article 20(2) considers that only extreme speech should be banned and the test should be set at a very high level indeed.
- (iv) The Camden Principles on Freedom of Expression and Equality, an accepted standard of free speech imperatives, has in Article 12 (ii) a clear sense of intention to be part of 'advocacy' of material that would promote hatred towards a specific group. The Camden Principles state the need for a target group which has to receive 'opprobrium, enmity and detestation' and that these have to occur in an 'intense' manner.
- (v) General Comment no. 24 of the UN Human Rights Committee focusses upon the issue of incitement as likely to trigger 'discrimination, hostility or violence' as imminent risk. These are standards set considerably higher than those in Ireland's current blasphemy law.
- (vii) Blasphemy laws are condemned by General Comment no.34 of the Human Rights Committee Section 48.
- (viii) The Rabat Plan of Action (2012) recommends: 'States that have blasphemy laws should repeal these as such laws have a stifling impact on the enjoyment of freedom of religion or belief and healthy dialogue and debate about religion.'
- (ix) In UN Doc. A/HRC/2/3 20 September 2006 the then United Nations Special Rapporteur on freedom of religion or belief declared 'expressions should only be prohibited under article 20 if they constitute incitement to imminent acts of violence or discrimination against a specific individual or group.'
- (x) The Venice Commission published a report in 2009 on freedom of expression and freedom of religion. The report concluded that incitement to hatred, including religious hatred, should be a crime; that insult to religious feelings should not be a crime; and that the offence of blasphemy should be abolished and should not be reintroduced.
- (xi) In 2010 the then United Nations Special Rapporteur on freedom of religion or belief (Frank La Rue) argued blasphemy laws were incompatible with human rights principles and many laws that reflect these.
- (xii) In December 2012, in response to the current situation in Ireland the United Nations Special Rapporteur Professor Heiner Bielefeldt has commented in the following manner; "There is a growing consensus within the human rights community that we have to move away from anti-blasphemy laws which, as countless examples demonstrate, generally have intimidating effects on religious or belief minorities, dissenters, converts and others. Rather than resorting to blasphemy legislation, what we ought to do is try to overcome stereotypes, prejudices by enhancing interreligious and intercultural communication, including between believers and non-believers. Moreover, potential target groups of national, racial or religious hatred may need support and protection and we should try to be creative in expressing sympathy for their vulnerable situation so that they can rightly feel not to be left alone."

### **3. Why the Irish blasphemy law in particular is harmful**

#### **3(a) The Irish blasphemy law reinforces the religious ethos of the 1937 Constitution**

- (i) We should be removing 1930s theistic references from the Irish Constitution, or updating them to reflect the reality of Ireland today, not legislating to enforce them.
- (ii) The preamble to our Constitution states that all authority of the State comes from, and all actions of the State must be referred to the Most Holy Trinity. It also humbly acknowledges all of the obligations of the people of the State to Our Lord Jesus Christ.
- (ii) Under the Irish Constitution, you cannot become President or be appointed as a Judge unless you take a religious oath under God asking god to direct and sustain you in your work. These religious declarations are contrary to Ireland's obligations under the UN International Covenant on Civil and Political Rights.
- (iv) In Article 44, the State acknowledges that the homage of public worship is due to Almighty God. This is not even an assertion of the right of citizens to worship this god. It is an assertion of the right of this god to be worshipped by citizens.
- (v) The Constitution also contains other references to this god. Article 6 states that all powers of government derive, under God, from the people. The last line of the Constitution dedicates the Constitution to the glory of God and the honour of Ireland. There are also other references in the Constitution to religion, as opposed to gods.

#### **3(b) The Irish blasphemy law brings our parliament and our laws into disrepute**

- (i) The Irish blasphemy law does not protect religious belief; it incentivizes outrage and it criminalises free speech. It also treats religious beliefs differently to atheistic or secular beliefs, which are not protected by similar laws.
- (ii) There are clear and obvious definitional problems around the wording that is citing elements of degree to enact the offence.
- (iii) Within the provisions of the law the blasphemous matter has to be 'grossly' abusive and there is no clear definition of when this level of abuse has been reached as opposed to 'mild' or 'minimal' abuse, currently deemed acceptable within the law.
- (iv) This matter also has to cause 'outrage' which is again not clearly defined. This contains a clear element of 'intention' which with blasphemy is very hard to prove in court. Moreover the legal test of a sufficient level of outrage is more likely to ensure this level of reaction is inspired amongst those so offended. Arguably this offers an incentive for such behaviour and reaction. We should be educating people to respond in a more healthy manner than outrage when somebody expresses a belief that they find insulting.
- (v) The law requires a 'Substantial number' of adherents to be offended by blasphemous material. This number is not defined, neither is 'adherents'.
- (vi) There is no clear suggestion that the law in section 32 has any targeted intention to prevent a breach of the peace – a state of affairs universally accepted as central to the retention of laws of blasphemy into modern times.

- (vii) The requirement that a 'Reasonable person' be offended is another conception lacking definition. Likewise 'matters held sacred' is again poorly defined and liable to selectively be misinterpreted by victim or perpetrator alike.
- (viii) The requirement to establish '... genuine literary, artistic, political, scientific or academic value' is also problematic. It is unclear what might constitute such proof and whether this can be unequivocal.
- (ix) Attempts to define 'religion' are clumsy at best and have been productive of problems for other legislatures. When the Home Office in Britain investigated widening the law beyond Christianity in the early 1930s it gave up since defining 'religion' was considered to be spectacularly problematic.
- (x) The definition of 'religion' seeks to rule out 'cults' (again not positively defined) or organisations the 'principle object of which is the making of profit' or that 'employs oppressive psychological manipulation.' Court cases where these characteristics are associated with any religion (conceivably even with established mainstream religions) will themselves cause great offence. This whole situation is likely to prove similarly embarrassing for the Irish government and judiciary.
- (xi) It has been suggested that the law as constructed was made deliberately unworkable to ensure it was never enacted. Even if this was true, such a stance relies upon a prevailing and consistent attitude amongst those in government considered sensible enough to ensure this remains the case. This is a dangerous assumption. We have already seen from the X Case, when the State sought an injunction to prevent a raped pregnant child from leaving the country, that religiously-inspired Constitutional provisions can be implemented when nobody expects it to happen.
- (xii) Likewise, if the law was constructed with such assumptions, this is parochial in the extreme and neglects the wider global implications of its existence. Indeed Ireland's law has explicitly been cited as a precedent that should allow other countries to develop laws against blasphemy. Ireland's stance on the matter runs counter to what is occurring in other western countries, and its own actions no longer occur in isolation and convey signals to the rest of the world. Blasphemy laws oppress ALL religious believers and non-believers as demonstrated by the actions taken by governments listed in Section 2(b).

### **3(c) Islamic states use the Irish blasphemy law at the United Nations to promote universal blasphemy laws**

- (i) The Islamic States at the United Nations have been campaigning to have laws against blasphemy, or defamation of religion, implemented internationally. They make political use of laws against blasphemy which are recent innovations, passed in western states such as Ireland.
- (i) Pakistan has used the language of Ireland's law in its proposals to the Ad Hoc Committee on the Elaboration of Complementary Standards in its call for an international instrument preventing the defamation of religion. Many legal authorities have argued that a universal law against defamation or blasphemy would subvert the principles of human rights and free expression legitimising a range of unacceptable actions taken by governments.
- (iii) Heiner Bielefeldt, United Nations Special Rapporteur on Freedom of Religion, shares this concern, as is reflected in the quote from him on page 1 of this submission.

## 4. Summary and recommendations

### 4(a) Many reputable Irish bodies have already recommended removing the offence of blasphemy from our Constitution and laws

- (i) In December 1991, the Law Reform Commission recommended deleting the reference to blasphemy from the Constitution on the grounds that there was no place for such an offence in a society which respects freedom of speech. The President of the Commission was Justice Ronan Keane, then a High Court Judge and later Chief Justice of Ireland.
- (ii) In May 1996 the Irish Constitution Review Group recommended that the reference to blasphemy be deleted from the Constitution. The Review Group was chaired by TK Whitaker, and had fifteen members from the fields of law, administration, economics, education, political science and sociology. With regard to freedom of expression, the Review Group recommended that Article 40.6.1 should be replaced by a new clause protecting the right of free speech which was modeled on Article 10 of the European Convention of Human Rights. It said that the onus should be on the Government to show that restrictions on free speech were objectively necessary.
- (iii) In July 2008 the Joint Oireachtas Committee on the Constitution recommended deleting the reference to blasphemy from the Constitution, on the grounds that a modern Constitution should not expressly prohibit blasphemy, and that the Supreme Court decision of 1999 had already rendered the offence a dead letter anyway. The Committee suggested that, if there is a need to protect against religious offence or incitement, it is more appropriate that this be dealt by way of legislative intervention, with due regard to the fundamental right of free speech.
- (iv) In December 2008 in Durban, the United Nations discussed an Egyptian motion on “combating defamation of religion”. Ireland voted with the other EU states that there should not be such a crime as “defamation of religion”. The Minister for Foreign affairs, Micheal Martin, later explained why Ireland had taken this position. He told the Dail that: “We believe that the concept of defamation of religion is not consistent with the promotion and protection of human rights. It can be used to justify arbitrary limitations on, or the denial of, freedom of expression. Indeed, Ireland considers that freedom of expression is a key and inherent element in the manifestation of freedom of thought and conscience and as such is complementary to freedom of religion or belief.”
- (v) In 2008, the Venice Commission, the body that advises the Council of Europe on constitutional matters, published a report on freedom of expression and freedom of religion which was co-written by the Commission’s Irish member, Finola Flanagan, the Director General and Senior Legal Advisor in the Office of the Attorney General. The report concluded that incitement to hatred, including religious hatred, should be a crime; that insult to religious feelings should not be a crime; and that the offence of blasphemy should be abolished and should not be reintroduced.

The report advised that the purpose of any restriction on freedom of expression must be to protect individuals, rather than to protect belief systems from criticism. It said people must be able to criticise religious ideas, even harshly and unreasonably, and even if it hurts other people’s religious feelings, as long as they do not advocate hatred against an individual or groups. The report said that democratic societies must not become hostage to the excessive sensitivities of certain individuals, and that freedom of expression must not indiscriminately retreat when facing violent reactions. Instead, the level of tolerance of these individuals and of anyone who would feel offended by the legitimate exercise of the right to freedom of expression should be raised.

The report found that it is not exclusively or even primarily for the courts to find the right balance between freedom of religion and freedom of expression, but rather for society at large, through rational discussions between all parts of society, including believers and non-believers. The report concluded that: “Democracy must not fear debate, even on the most shocking or anti-democratic ideas. It is through open discussion that these ideas should be countered and the supremacy of democratic values be demonstrated. Mutual understanding and respect can only be achieved through open debate. Persuasion, as opposed to ban or repression, is the most democratic means of preserving fundamental values.”

In an appendix to the report, Finola Flanagan answered questions about Ireland. She was asked: “Is there in your opinion/according to the leading doctrine a need for additional legislation concerning: (a) the prohibition of blasphemy or religious insult? (b) incitement to religious hatred? (c) hate speech concerning a group? (d) speech or publication with a discriminatory effect?” She replied: “In general the legislation provides adequately for these matters. The criminal law, together with the Prohibition on Incitement to Hatred Act and the Criminal Justice (Public Order) Act, provide for appropriate offences. In addition to legislation outlined above, there is equality legislation which prohibits discrimination on grounds of religious belief (or the absence of belief) and on grounds of racism.”

**4(b) Atheist Ireland is asking the Convention to recommend the following:**

- (i) Remove the offence of blasphemy from Article 40.6.1 of the Constitution. This would enable the Oireachtas to remove the offence of blasphemy from Section 36 of the Defamation Act 2009.
- (ii) Revise Article 40.6.1 generally, modeled on Article 10 of the European Convention of Human Rights, as recommended by the 1996 Constitution Review Group.
- (iii) Include in the revised Article 40.6.1 a clause prohibiting laws against blasphemy. This would oblige the Oireachtas to remove the offence of blasphemy from the Defamation Act, and it would also protect the Irish people from future such laws.
- (iv) Consider the inter-related impact of the blasphemy clause and other religiously-inspired aspects of the Constitution.

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Professor David Nash, Oxford Brookes University, expert on international blasphemy laws