

Margaret Howard Memorial Lecture

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Life as a barrister brings many bizarre experiences, but few more ridiculous than making submissions in 1999 to the Video Appeals Tribunal in the Health Centre in Frith Street, Soho on how close a close-up was acceptable in the adult videos, *Nympho Nurse Nancy* and *Horny Catbabe*, to be sold in licensed sex shops. When arguing such censorship cases, it is permissible, indeed often essential, to follow the precedent set by John Mortimer QC who wrote that when watching films in preparation for obscenity trials "I take the precaution of removing my glasses, which reduces the whole messy business to an impressionist blur".¹ When giving the Margaret Howard Memorial Lecture on Censorship, however, it is important to keep the spectacles on, so as clearly to focus on the subject. Among Margaret Howard's many qualities were her love and understanding of literature, theatre and poetry. As a young woman, Margaret Howard read for the bar. It is a great honour to be asked to give this year's memorial lecture on a subject so close to her interests: censorship of the arts.

In the last 40 years, we have abandoned most of the restrictions which previous generations thought appropriate to control the content of novels, films, and theatre. We cannot now regard as other than risible the threat in 1922 by the Director of Public Prosecutions, Sir Archibald Bodkin, to prosecute the academic F.R. Leavis if he referred in his lectures at Cambridge University to James Joyce's *Ulysses*, a novel which Bodkin concluded contained "a great deal of unmitigated filth and obscenity".² Who would now seek to justify the censorship of theatrical productions by a Lord Chamberlain whose office decided in 1953 to refuse to licence a play if it included the noise of a flushing lavatory because he "objects in principle to the pulling of lavatory [chains] and all that stands for".³ And who would wish to return to a world in which Graham Greene's original script which later became his 1958 novel *Our Man In Havana* could not be filmed because the board of film censors decided "they could not grant a certificate to a film making fun of the Secret Service".⁴ A particularly odd decision when the Secret Service so regularly makes itself look ridiculous.

Our law now generally adopts a liberal approach to sexually explicit and violent material which may offend viewers. The role of the law has rightly been reduced to three functions. First, preventing the *public* display of unreasonably offensive material.

Second, it is legitimate for the State to prevent explicit material from being made available to young persons. One can argue about whether the right age is 16, 18 or 21 (or, as my mother thinks, over 49). But plainly there is some material suitable for adults to which children and young persons should not have access. This does not mean that the State can restrict access to material for adults because of the risk that it may come into the hands of children. The would be "to burn the house to roast the pig", as Mr Justice Frankfurter said for the United States Supreme Court in 1957 finding unconstitutional a provision in the Michigan Penal Code which made it a criminal offence to sell to an adult any book containing obscene language "tending to the corruption of the morals of youth".⁵

The third legitimate role of the State in relation to explicit material is that there remains some such publications which even adults should not be allowed to purchase and to look at in private. Child pornography, snuff movies, bestiality. We will not all draw the line in the same place, but few if any of us would contend that there should be no limits.

The battle for freedom of expression in relation to sexually explicit material has largely been won. Any moderately astute 12-year-old now has access via the internet to material that no publisher would have sold 20 years ago without risking a lengthy prison sentence. The removal of most of the barriers to freedom of sexual expression means that a lecturer on censorship cannot now devote himself to such matters without provoking in his audience a reaction similar to that of the juror in Hamilton County, Cincinnati in 2004 who was hearing an obscenity case concerning a video, *Maximum Hardcore Extreme, Volume 7*. The trial had to be abandoned when,

¹*New Statesman* July 1978, cited in Geoffrey Robertson *Obscenity* (1979) at pp.113-114.

²*The Daily Telegraph* 16 May 1998.

³Nicholas de Jongh *Politics, Prudery and Perversions: The Censoring of the English Stage, 1901-1968* (2000), pp.106-107.

⁴Graham Greene *The Tenth Man* (1985), p.17.

⁵*Butler v Michigan* (1957) 352 US 380, 383. Cf the speech by the Home Secretary, Sir William Joynson-Hicks, in 1928 on the censorship of books : "That freedom, in my view, must be determined by the question as to whether what is written or spoken makes one of the least of these little ones offended" : Alan Travis *Bound and Gagged : A Secret History of Obscenity in Britain* (2000), p.62.

during the showing of the offending video, the juror dozed off.

The front-line of censorship has moved. Freedom of expression today faces a much more powerful enemy who wants to restrict the artistic imagination by prohibiting the publication of material which it finds offensive because of the ideas it contains or the language in which it expresses those ideas. My subject is censorship of works which offend religious feelings. In the Old Testament, when Miriam spoke critically about the relationship between her brother, Moses, and God, she was punished with leprosy. Freedom of expression remains very dangerous when it offends religious sensibilities.

Article 9 of the European Convention on Human Rights guarantees the right to freedom of thought, conscience and religion. This includes a right to manifest my religion in worship, teaching, practice and observance. The law protects your right to believe whatever you wish : that Jesus Christ rose from the dead, that God parted the Red Sea for the Children of Israel, or that the works of L. Ron Hubbard, founder of the Scientologists, contain (as he claimed) the way to total happiness (and not, as his critics suggested, the way to total bankruptcy).

But religious groups often also demand the right not to be offended by what non-believers say about their beliefs. In recent months, we have seen many examples of such a conflict between religious beliefs and freedom of expression. Last December, violent protests by hundreds of Sikhs led to the closure of a play, *Behzti* (dishonour), being staged at the Birmingham Repertory Theatre. The play contains scenes of rape and murder in a Sikh temple. The protesters charged into the building, smashed windows, injured three policemen and terrified theatre-goers, including children who were there to watch a performance of Roald Dahl's *The Witches* in another auditorium. The play's run was cancelled when the police advised that they could not guarantee security. The Home Office Minister, Fiona Mactaggart, told Radio 4's *Today* programme that it was a healthy sign of free speech that "people care enough about a performance to protest". She made no mention of the rights of the author, the performers, and the audience who wished to see the play.⁶

In January, BBC2 broadcast *Jerry Springer - The Opera*, which had won the Olivier Award for best new musical in the theatre. Prior to the broadcast, the BBC received more than 45,000 complaints from Christians offended by what they regarded as blasphemous references to Jesus Christ and the Virgin Mary. The homes of BBC executives were protected by security guards after an evangelical Christian group gave the details of addresses and telephone numbers on its website.⁷ A judicial review application is pending, challenging the legality of the broadcast, partly on the ground that it was blasphemous. (I should declare an interest : I act for the BBC).

In March, a French judge ordered the removal from billboards of advertising posters for a fashion house based on Leonardo da Vinci's painting *The Last Supper* but featuring female models in the pose of the apostles. The judge agreed with the complainant, an association of French bishops, that the posters were offensive.⁸

And most alarming of all, there is the fate of the Dutch film-maker, Theo van Gogh, whose work had focused on the repression of women in Islamic culture. His film *Submission* included images of naked women with words from the Koran written on them. Last November, van Gogh was cycling to work when a bearded young man, dressed in a long Middle eastern-style shirt, shot him several times. Van Gogh begged for mercy, asking, in a pitiful attempt to maintain the values of free expression even in extreme circumstances, "Surely we can talk about this?". His assailant then pulled out a knife, slit van Gogh's head from ear to ear, kicked the dying body and walked away.⁹

Mark Thompson, Director General of the BBC, explained in a speech in March in relation to *Jerry Springer - The Opera*¹⁰ that broadcasters in this country often receive unreasoned objections to programmes, typified by the letter sent to the distinguished programme-maker John Ware, which said simply: "I would rather eat dog-shit than watch another of your programmes". To which Mr Ware replied, succinctly, "Bon appetit". I want to try to analyse the issues in terms of principle.

I start from the premiss that freedom of the artistic imagination is of fundamental importance in our society. The right of novelists, playwrights, and film-makers to express ideas and convey information, and the

⁶The Times 20 December 2004, Daily Telegraph 22 December 2004 and The Sunday Telegraph 26 December 2004.

⁷The Times 10 January 2005.

⁸The Times 12 March 2005.

⁹Ian Buruma "Final Cut" The New Yorker 3 January 2005.

¹⁰Mark Thompson *Angels and e-mails* (7 March 2005).

right of others to receive such ideas and information, are core values. Such freedom of expression strengthens our democracy by testing political and social theories and practices, and it enriches our culture by offering commentary on, and insights into, our way of life and the nature of the human condition. A life without the drama, comedy and tragedy of film, theatre, novels and television would be a much impoverished life for us all, whatever our taste. Subject to the restrictions authorised by the laws of libel, obscenity, breach of confidence and so on, we do not let, and we would not want to let, the government or judges decide for us what we can watch and read.

But nor do we want such decisions to be taken for us by religious groups upset at offence to their feelings. Tolerance is a two-way street, Religious groups in this country have rightly demanded tolerance of their existence and their practices. But they have a duty in return to show tolerance for dissidents and for critics. They must learn that when others say and do things that offend, the answer in a liberal democracy is to explain, to debate, and sometimes (if the other person cannot be persuaded) to turn the other cheek. All of us have to tolerate the existence of many things that we find offensive. There is no good reason for the law to accord special protection for the feelings of the religious. Unless we make clear that it is unacceptable for a religious group to prevent the performance of a play, we will be following a path that leads to the murder of a film-maker whose work causes offence. And who could blame novelists, playwrights and film-makers if they would rather avoid tackling a sensitive theme and running the risk of having their throat cut.

The law of the land is badly at fault in raising expectations among religious groups by wrongly leading them to believe that offence to their feelings is a justification for censorship. There are two laws I want to mention: the law of blasphemy and the Government's intention to introduce a new law of incitement to religious hatred.

Our law still contains special provisions prohibiting the publication of material offensive to Christianity. The crime of blasphemy is committed by anyone who publishes "contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ or the Bible".¹¹ The last successful prosecution for blasphemy was in 1977 when the editor and publisher of *Gay News* were convicted at the Old Bailey for publishing a poem, "The Love that Dares to Speak its Name", describing homosexual acts involving Christ while he was on the Cross. Both defendants were fined, and the editor also received a suspended sentence of imprisonment. The trial judge, Alan King-Hamilton, wrote in his memoirs that he felt "half-conscious of being guided by some superhuman inspiration" when preparing and delivering his summing-up to the jury.¹² The convictions were upheld by the House of Lords.¹³ There had been no previous blasphemy prosecution since 1922 when the Court of Criminal Appeal upheld the conviction of, and the sentence of nine months' imprisonment on, a defendant who distributed pamphlets describing Jesus Christ entering Jerusalem "like a circus clown on the back of two donkeys".¹⁴ But the judicial review of the BBC's decision to broadcast *Jerry Springer - the Opera* shows that the law of blasphemy cannot be dismissed as an historic relic.

The crime of blasphemy only prohibits publications offensive to Christianity, indeed only those Christian doctrines to which the established Church of England subscribes. In 1991, the Divisional Court dismissed an attempt to bring a private prosecution of Salman Rushdie's novel *The Satanic Verses*, ruling that the crime of blasphemy does not prohibit attacks on Islam.¹⁵ The European Commission of Human Rights rejected a complaint that the law of blasphemy breached the European Convention on Human Rights by discriminating in favour of Christianity.¹⁶ But the continuing existence of the law of blasphemy protecting Christianity causes other religious groups to believe that they too should have a right to protection against offence to their religious feelings. There is no justification for a law which protects only the feelings of one religious group. The question is whether the blasphemy law should be abolished or should be extended to other religions.

Blasphemy laws have twice been upheld by the European Court of Human Rights. In 1985, the Otto Preminger Institute in Austria announced its intention to show a film, *Council in Heaven*. The film was based on

¹¹*R v Lemon* [1979] AC 617, 665F-H (Lord Scarman approving *Stephen's Digest of the Criminal Law*, 9th edition, 1950 at article 214).

¹²Judge Alan King-Hamilton QC *And Nothing But The Truth* (1982), p.180.

¹³*R v Lemon* [1979] AC 617.

¹⁴*R v Gott* (1921) 16 App Rep 86 and (1922) 16 Cr App Rep 87.

¹⁵*R v Chief Metropolitan Magistrate ex parte Choudhury* [1991] 1 QB 429.

¹⁶*Choudhury v United Kingdom* (Application No. 17439/90, 5 March 1991).

a play depicting God as old and infirm, Jesus Christ as a simpleton, and the Virgin Mary as immoral. Before the film could be shown, the Austrian courts ordered its seizure and forfeiture because its contents would offend the religious feelings of a person of average sensitivity. The Institute complained that this was a breach of the right to freedom of expression under Article 10 of the European Convention on Human Rights. The European Court of Human Rights held, by six votes to three, that there had been no breach of Article 10.¹⁷ The majority judgment concluded that the interference with free speech was "necessary in a democratic society" in order to guarantee the "rights of others" to protection from gratuitous insults to their religious feelings.

The European Court repeated its tolerance of an intolerant blasphemy law in 1996. The Video Appeals Committee of the British Board of Film Classification refused a certificate for a video work, *Visions of Ecstasy*, on the ground that it was blasphemous in that it portrayed a nun imagining sexual activity with Christ on the cross. The director, Nigel Wingrove, brought a complaint under the European Convention on Human Rights. In 1996, the European Court of Human Rights, by a majority of 7 to 2, dismissed the complaint.¹⁸ The majority emphasised the broad margin of appreciation enjoyed by national authorities.

The majority judgments of the Court in these two cases were unconvincing in their attempt to justify the existence of blasphemy laws. First, the Court failed to understand that social development, in art as well as in politics, has often proceeded from the assertion of ideas that cause offence, sometimes outrage, to established thought, including religious thought. Creative work often uses images which shock or disturb viewers. Freedom of expression is of limited value if it covers only that which does not upset received opinion or conventional values. Ridicule has always been amongst the most powerful weapons of the critic of the established order. Judges, whether in national courts or in Strasbourg, should resist the temptation to act as arbiters of good taste.

Second, the European Court judgments assume that it is for judges to assess whether there is sufficient artistic merit to justify the degree of offence to the devout. But what qualifications do judges have to assess whether to allow performances of Shakespeare's anti-semitic play *Merchant of Venice*; showings of the Monty Python film *The Life of Brian*, with its immortal line from Brian's mother, "He's not the Messiah - he's a very naughty boy"; the inclusion in an exhibition of artist Chris Ofili's 1998 Turner Prize winning collage of the Virgin Mary made out of elephant dung; or whether to allow the nativity scene at Madame Tussauds last Christmas featuring Victoria and David Beckham as Mary and Joseph.

Third, the European Court was oblivious to the fact that to penalise dissent and ridicule is especially dangerous in the context of established religion, which commands uncritical devotion from many of its followers, and so enjoys considerable power and influence. In such a climate, dissenting voices will struggle to make themselves heard. It is the task of a Court applying the concept of freedom of expression to ensure that critics of religion are not silenced. Galileo greatly offended religious feelings in their day, and were regarded as making no useful contribution to human knowledge.

Fourth, the European Court ignored the fact that it is ironic and illogical for the law to provide special rules prohibiting insults to the almighty. His followers already have the very considerable comfort of knowing that he is able to enforce whatever remedy he thinks appropriate in a much higher court. Those intending to insult God should, no doubt, remember the fate of Uzzah (as described in the second book of Samuel, at verse 6). When the Ark was about to fall while being transported, Uzzah reached out to protect it, but "the Lord was angry with Uzzah and struck him down for his rash act". Now that is a severe sentence. But it is not a matter for the Oxford Crown Court. As the Emperor Tiberius concluded in the first century AD: "insults to the gods are the affairs of the gods". The law of blasphemy is unjustified in principle, and should be abolished.

It is bad enough that the blasphemy law survives in this country. The Government is proposing to amend the law to introduce a new offence of incitement to religious hatred. That would make matters worse by adding to the restrictions on freedom of expression in relation to religious sensibilities and by encouraging religious communities to believe that it is the function of the legal system to protect them against offence to their religious feelings.

Mindful, no doubt, of Jonathan Swift's aphorism that "we have just enough religion to make us hate, but

¹⁷*Otto-Preminger Institute v Austria* (1994) 19 EHRR 34.

¹⁸*Wingrove v United Kingdom* (1996) 24 EHRR 1.

not enough to make us love one another"¹⁹, the Government asked Parliament earlier this year to make it a criminal offence to provoke religious hatred. The proposal was approved by the House of Commons but, because of opposition from Conservatives and from Liberal Democrats in the House of Lords, there was no time to enact the proposal before the General Election. The Queen's Speech earlier this week²⁰ announced that an Incitement to Religious Hatred Bill will be re-introduced in this session. I hope that Parliament will resist the proposal and keep faith with freedom of expression. Offending religious convictions is no basis for imposing criminal convictions.

The Government will seek to amend the Public Order Act 1986 which already makes incitement to racial hatred a criminal offence. The Government want to apply the same scheme to hatred against persons on religious grounds. So it would be a criminal offence to use threatening, abusive or insulting words or behaviour if you "intend to stir up religious hatred", or if your conduct is "likely to stir up" religious hatred. Prosecutions could only be brought by the Attorney-General. A convicted person would face up to seven years in prison.

The proposal starts from the false premiss that race and religion should be treated in the same way. But there are important differences. To make hostile comments about my race is to criticise me for what I am, for innate characteristics that I have not chosen and which say nothing (other than to the racist) about how I act. Because such comments insult my common humanity and cannot be justified, it is right and proper that the law should impose limits on your freedom of speech when it insults my race.

But to comment on my religion is to criticise the conduct of an organisation to which I choose to belong. And religions, unlike racial groups, usually make claims about how society should be organised. By reference to those views, religions seek to attract new members. Religious beliefs have a significant impact on the way its adherents treat each other and strongly influence how society is organised. Critical comments on religious beliefs may serve a valuable function in identifying and remedying abuse of power. It may be difficult to draw a distinction between criticism of those beliefs and criticism of the people who propagate those beliefs. Such criticism is not reduced in value by the tendency of the religious to react with extreme sensitivity when their beliefs are subjected to analysis.

If the Government's proposal were to be enacted, novelists, playwrights, and comedians would need to seek legal advice before strongly criticising members of the Catholic Church for failing to take adequate steps against paedophile priests; or Jews for Judaism's treatment of women (and their children) whose husbands refuse to give them a religious divorce; or Moslems for Islam's intolerance of "infidels" and its discrimination against women and homosexuals. The Bill offers no definition of "religion", so an author may be inviting prosecution by making harsh comments about the Reverend Moon or the Satanist beliefs recognised last year by the Royal Navy.

Irreverently critical comment on religious topics, particularly by a comedian or a novelist, might well be regarded as "abusive or insulting". Even if the author's intention is to provoke debate on an issue of public importance, prosecutors might be able to establish that "hatred" (the quality and quantity of which is not specified in the legislation) is likely to be "stirred up" (an inelegant phrase that should lead to prosecution of the Parliamentary draftsman). Indeed, the more powerful the work, the greater the risk of legal action. That you may have good reason for making insulting comments which provoke hatred of a particular religious doctrine would be no defence. Nor would it be a defence that you did not intend to stir up hatred. Because of the uncertainty inherent in so vague a criminal law, it would inevitably have a chilling effect on freedom of expression about religious beliefs and practices. At a time when religion is becoming both more powerful a force in our society and more intolerant of criticism, the law should be protecting those who wish to speak out on such matters, not threatening to impose further penalties.

The very existence of such a law on the statute book would serve to inflame religious passions, encouraging religious groups to believe that the law will provide a remedy when a novelist or a film director creates a work which criticises their religion or their prophet.

Religions already have strong protection both spiritual (blasphemers will, no doubt, spend much longer than 7 years paying the price of eternal damnation) and temporal. The law punishes (and rightly so) breaches of

¹⁹Jonathan Swift *Thoughts on Various Subjects* (1711).

²⁰*The Times* 18 May 2005.

the peace, harassment and assault. In 2001, Parliament created new offences of religiously aggravated assaults, criminal damage, harassment and public order crimes, where the defendant acts out of hostility towards a person's religion.²¹ Discrimination on grounds of religion or belief in employment is unlawful.²²

The Government's defence of its proposal is that a new law is needed because the existing laws on incitement to race hatred cover offences against Sikhs and Jews, as they are each regarded as a race²³, but the race hatred laws do not protect Moslems. There are two answers.

The first is that if the current law offers inadequate protection, a narrow amendment to redefine race hatred laws would suffice. The objection to the proposed new law is the breadth of the interference with freedom of speech on religious matters which it would introduce. A much more tolerable solution is that proposed by the Liberal Democrats earlier this year: race hatred would be redefined to include hatred against a person's membership, or presumed membership, of a religious group as a pretext for stirring up racial hatred.²⁴ Such a law would not inhibit freedom of expression on religious beliefs and practices.

The second answer to the Government's concern is that it is very doubtful that existing law fails to offer sufficient protection. At the end of 2001, Mark Norwood, a Regional Organiser for the British National Party, displayed in the window of his flat in Shropshire, a large poster with a photograph of New York's Twin Towers in flames on September 11, 2001, with the slogan "Islam out of Britain – Protect the British People". He was prosecuted under section 5 of the Public Order Act for displaying a poster which was threatening, abusive or insulting, and likely to cause harassment, alarm or distress, in circumstances where his offence was aggravated by being motivated by hostility towards a racial or religious group. He was convicted and fined. The Divisional Court dismissed his appeal. The European Court of Human Rights rejected his complaint that this was a breach of his right to freedom of expression.²⁵ There is no evidence of a need for a new law to provide broader restrictions on freedom of expression.

The Government's proposal to amend the law to impose further restrictions on freedom of speech which offends religious feelings offends the strong secular beliefs of many of us that such additional restrictions are wrong in principle. On this occasion, the devil is not in the detail. Intolerant religious groups pose one of the gravest threats to freedom of expression in our tolerant society.

The laws against race hatred are based on a principle of common humanity. But if all men and women are created equal, their religions are not always a force for equal good. Religious doctrines and religious practices may be foolish, dangerous or sometimes evil. Because adherents may believe such doctrines and practices to be required by divine will, rational debate is in any event difficult to promote. The law should be encouraging freedom of expression in relation to such powerful forces.

No one would seriously suggest that the law should penalise words or behaviour which have the intention or effect of stirring up hatred of a political group. Such a law would be objectionable because critical comment on matters of public interest should not be further inhibited. Religion is as powerful a force (indeed, often much more powerful) than political affiliations.

In a case in the United States District Court in 1971, the plaintiff brought proceedings against Satan for causing him misfortune and misery, thereby violating his constitutional rights. The judge dismissed the case because "the complaint contains no allegation of residence by the defendant in this district" and the plaintiff "has failed to include with his complaint the required form of instructions for the United States Marshal for directions as to service of process".²⁶ Sometimes, the law has to recognise that it cannot sensibly resolve religious disputes.

I do hope that nothing I have said today has caused offence to so attentive an audience.

²¹See sections 28-32 of the Crime and Disorder Act 1998, as amended by the Anti-Terrorism, Crime and Security Act 2001.

²²The Employment Equality (Religion and Belief) Regulations 2003 SI No. 1660.

²³*Mandla v Dowell Lee* [1983] 2 AC 548 and *Seide v Gillette Industries Ltd* [1988] IRLR 427.

²⁴*Hansard*, House of Commons, 7 February 2005, columns 1201-1227.

²⁵*Norwood v United Kingdom* (Application No. 23131/03, 16 November 2004).

²⁶*US ex rel Gerald Mayo v Satan and his staff* (1971) 54 FRD 282.