Journal of Law and Religion 35, no. 1 (2020): 33–60 © Center for the Study of Law and Religion at Emory University
doi:10.1017/jlr.2020.11

JUSTIFYING BLASPHEMY LAWS: FREEDOM OF EXPRESSION, PUBLIC MORALS, AND INTERNATIONAL HUMAN RIGHTS LAW

NEVILLE COX
Professor of Law and Dean of Graduate Studies, Trinity College Dublin

ABSTRACT

In its General Comment No. 34 dealing with freedom of expression, the United Nations Human Rights Committee (UNHRC) rejected the idea that a blasphemy law could ever be human-rights compliant, unless its function was to prevent incitement to religious or racial hatred. This is a widely shared view that is consistently endorsed when any international blasphemy controversy (such as that involving the Danish Cartoons in 2005) arises. This article assesses the legitimacy of this view. The International Covenant on Civil and Political Rights (ICCPR) permits freedom of expression to be limited inter alia in the name of public morality, provided that the law in question is also necessary to achieve this end. This article argues that because a blasphemy law can be a response to a public moral vision; therefore a blasphemy law can serve a legitimate purpose insofar as human rights law is concerned. It is further submitted that whereas some blasphemy laws are unacceptably draconian, it is not inherently impossible for such a law to represent a proportionate response to a public morals concern. Thus, the conclusion from the UNHRC is not warranted by the text of the ICCPR. Moreover, there is a risk that, in reaching this conclusion the committee is evincing an exclusively secularist worldview in its interpretation of the ICCPR that undermines its claim to universality.

KEYWORDS: blasphemy, public morality, freedom of expression, Ireland, Pakistan, human rights

INTRODUCTION

In 2011, the United Nations Human Rights Committee (UNHRC) published its General Comment No. 34, dealing with freedom of expression and opinion. In paragraph 48, it concluded, "Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the International Covenant on Civil and Political Rights," save to the extent that they were aimed at fulfilling the obligations in Article 20 of the International Covenant on Civil and Political Rights (ICCPR)[1]—in effect, to prohibit incitement to hatred.[2]

1 United Nations Human Rights Committee [UNHRC], General Comment No. 34, Freedom of Opinion and Expression, CCPR C/GC/34, ¶ 48 (September 12, 2011), http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf; United Nations Human Rights Committee, Resolution 2200A (XXI), International Covenant on Civil and Political Rights [ICCPR], article 20 (December 16, 1966), https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

2 UNHRC, General Comment No. 34, ¶ 48. For discussion, see Michael O'Flaherty, "Freedom of Expression: The International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No. 34," *Human Rights Law Review* 14, no. 4 (2012): 627–54, at 652.

This view—that a blasphemy law is inherently incompatible with human rights—also came to the fore during the period between 1999 and 2011, when various organs of the United Nations (the Human Rights Committee, the Human Rights Council, and the General Assembly), at the behest of the Organisation of Islamic Cooperation, were annually passing resolutions targeting so-called defamation of religion (in effect, xenophobic stereotyping of Islam as having connections to terrorism).[3] It was widely suggested that these resolutions represented an inappropriate move to protect (some) religions at the expense of individual rights.[4] This view is also inevitably expressed when a global or, occasionally, a national blasphemy controversy (such as that involving the so-called Danish cartoons in 2005) arises[5] and had a particular poignancy in the aftermath of the attacks on the *Charlie Hebdo* offices in January 2015.[6]

There may, of course, be very good reasons why a state—especially a modern, secular, European state—would regard the existence in its jurisdiction of a blasphemy law as something anachronistic, pointless, or indeed morally invidious.[7] There may also be good reasons why *particular* blasphemy laws are not human-rights compliant—for example because they operate in an abusive fashion or because they provide for draconian or excessive sentences. On the other hand, it is a significant leap to the far broader conclusion that such a law can *never* be justified as a matter of international human rights law. Not merely is such a conclusion not warranted having regard to the text of Article 19 of the ICCPR, after all, but, as I discuss below, that text seems to point quite clearly in the opposite direction.

I am neither advocating for the merits of blasphemy laws, nor am I suggesting that *all* such laws or indeed any individual law are or is either worthy, or human-rights compliant. As it happens, some laws, such as that in Pakistan, are manifestly incompatible with human rights and for a

3 For analysis of the work of the United Nations in this regard, see Neville Cox, "Pourquoi Suis-Je Charlie? Blasphemy, Defamation of Religion, and the Nature of Offensive Cartoons," *Oxford Journal of Law and Religion* 4, no. 3 (2015): 343–67; Lorenz Langer, *Religious Offence and Human Rights: The Implications of Defamation of Religions* (Cambridge: Cambridge University Press, 2014): 160–98; Robert Blitt, "Should New Bills of Rights Address Emerging International Human Rights Norms? The Challenge of 'Defamation of Religion,'" *Northwestern University Journal of International Human Rights* 9, no. 1 (2010): 1–26; Joshua Foster, "Prophets, Cartoons and Legal Norms: Rethinking the United Nations Defamation of Religion Provisions," *Journal of Catholic Legal Studies* 48, no. 1 (2009): 19–57; Jeroen Temperman, "Blasphemy, Defamation of Religions and Human Rights Law," *Netherlands Quarterly of Human Rights* 26, no. 4 (2008): 517–45, at 530; Rebecca Dobras, "Is the United Nations Endorsing Human Rights Violations? An Analysis of the United Nations' Combating Defamation of Religions Resolutions and Pakistan's Blasphemy Laws," *Georgia Journal of International and Comparative Law* 37, no. 2 (2009): 341–80; L. Bennett Graham, "Defamation of Religions: The End of Pluralism," *Emory International Law Review* 23, no. 1 (2009): 69–84, at 69; Caleb Holzaepfel, "Can I Say That? How an International Blasphemy Law Pits the Freedom of Religion against the Freedom of Speech," *Emory International Law Review* 28, no. 1 (2014): 597–648, at 616.

4 See, for example, Heiner Bielefeld, Nazila Ghanea, and Michael Wiener, *Freedom of Religion or Belief: An International Commentary* (Oxford: Oxford University Press, 2016), 494–95.

5 Robert Kahn, "Flemming Rose, The Danish Cartoon Controversy and the New European Freedom of Speech," *California Western International Law Journal* 40, no. 2 (2010): 253–90, at 260; see also Derek Scally "Ten Years on Danish Daily Stands by Muhammad Caricatures," *Irish Times*, September 30, 2015, https://www.irishtimes.com/news/world/europe/ten-years-on-danish-daily-stands-by-muhammad-caricatures-1.2371640.

6 See generally Sejal Parmar, "Freedom of Expression Narratives after the *Charlie Hebdo* attacks," *Human Rights Law Review* 18, no. 2 (2018): 267–96; see, for example, "The Guardian View on Charlie Hebdo: Those Guns were Trained on Free Speech," *Guardian*, January 7, 2015, http://www.theguardian.com/commentisfree/2015/jan/07/guardian-view-charlie-hebdo-guns-trained-free-speech.

7 For a multifaceted discussion of these issues, see the various contributions in Jeroen Temperman and András Koltay, eds., *Blasphemy and Freedom of Expression: Comparative, Theoretical and Historical Reflections after the Charlie Hebdo Massacre* (Cambridge: Cambridge University Press, 2017).

https://doi.org/10.1017/jlr.2020.11 Published online by Cambridge University Press

multiplicity of reasons. My concerns, rather, are with (a) the proposition of principle that such laws can *never* be legitimate as a matter of human rights law and (b) the significance of the fact that such a proposition appears to have been widely accepted as universally applicable by international human rights bodies. Whereas I analyze the manifestation of these concerns in General Comment No. 34, my focus is more generally on the question of whether it is correct to say that blasphemy laws must, inevitably and always, be incompatible with international human rights law.

I submit that, in order to sustain such a proposition, it would be necessary to demonstrate not merely that *some* blasphemy laws are either pointless or else so draconian that they constitute disproportionate interferences with rights, but that either (a) by definition a blasphemy law can *never* be viewed as serving a legitimate purpose insofar as human rights law is concerned or (b) blasphemy laws must *always* represent disproportionate and non-necessary interferences with rights. Neither, I argue, is the case, and for two reasons.

First, I argue that the basis on which individuals or states mght regard *blasphemy* as objectionable is moral in nature. This is not to say that the publication of certain blasphemies may not have other undesirable effects—in terms of threatening public order or gravely offending people. Moreover, a state (or individuals) that may have no moral concern with blasphemy per se may well regard these *other* consequences as sufficiently objectionable, unjust, or socially damaging that they are worthy of legal proscription. This is, however, very different from that state or individual's regarding the blasphemy, itself, as being *inherently* objectionable *irrespective of whether or not it has these effects*. The *inherent* objectionability of blasphemy is based entirely on a moral judgment that certain irreverent treatment of the sacred is unacceptable. When a state passes a blasphemy law (as distinct from a law preventing speech that is defamatory, threatens public order, or is hateful), it is, in effect, stating that such a moral judgment is also part of its *public* moral vision. From a human rights standpoint, therefore, this is an example of speech being limited in the name of public morals—something that is, *prima facie*, a legitimate purpose for rights restriction under the terms of Article 19(3) of the ICCPR and Article 10(2) of the European Convention on Human Rights.

Secondly, it is true that many modern blasphemy laws rightly attract criticism because they represent seemingly disproportionate interferences with freedom of expression and because, in practice, their enforcement occurs in a context where rights of due process are inadequately protected. Critically, however, I argue that these factors are not *inherent* to a blasphemy law—the 2009 Irish law considered here is testament to this fact. It may not *usually* be the case that a blasphemy law that is genuinely grounded in public morals will not also carry strong penalties, but it is certainly not inherently impossible. Thus, it is also not possible to conclude that a blasphemy law must *always* be a disproportionate response to the legitimate purpose of protecting public morals.

For these two reasons, I conclude that the statement that a blasphemy law must always represent an unjustifiable interference with the international right to freedom of expression is a dubious one.

I may be criticized for taking these two issues—whether a blasphemy law can serve a legitimate purpose and whether it can represent a proportionate interference with freedom of expression—in isolation from each other. In other words, it may be that the real basis for the view that blasphemy laws cannot be compatible with human rights is that the kind of *religious* public morality that might underpin a blasphemy law is insufficiently important, from an international human rights perspective, to warrant any restriction on freedom of expression, and hence, *any* such law, however lenient, must, by definition, be disproportionate. If this *is* the basis for the conclusion in General Comment No. 34, however, I submit that it reflects a disturbing trend within the international human rights machinery to present the contemporary liberal secular approach in relation to how

societal values should be prioritized as if the approach had global moral legitimacy (irrespective of the lack of textual support for such a stance) and to ignore the views of multiple states and millions of people who think differently.[8] By doing so, both generally and specifically in their assessment of the legitimacy of blasphemy laws, the UNHRC and bodies like it, paradoxically, undermine the claim to universality of international human rights law.

GENERAL COMMENT NO. 34[9]

General Comment No. 34 (which replaces General Comment No. 10[10]) contains a broad analysis of aspects of the international right to freedom of expression, covering various issues where the restriction of the right is a matter of heightened controversy. Of particular relevance, for present purposes, is its analysis[11] of contexts in which Article 19(3) of the ICCPR—the paragraph that deals with *restrictions* on the right to freedom of expression—can be applied.

Article 19(3) provides as follows:

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

In keeping with other international human rights documents, therefore, Article 19(3) envisages a threefold step for determining whether a restriction on rights is human-rights compliant. First, it must be prescribed by law. Secondly, it must serve one of the legitimate purposes in subparagraphs (a) and (b). Thirdly, the restriction must also be necessary. In General Comment No. 34, the UNHRC looked at different contexts in which the right to freedom of expression might be restricted and made various points about the application of these three steps within these contexts. Its only general analysis of the public morals ground for restricting rights was a reference to a conclusion that it had reached in General Comment No. 22,[12] namely that a nation's public morals could not derive exclusively from a single social, philosophical, or religious tradition. I criticize this conclusion below.

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8 The same criticism can be made of the manner in which Ireland's restrictive abortion law was deemed by the UNHRC to violate human rights. Human Rights Committee, Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2324/2013, U.N. Doc. CCPR/C/116/D/2324/2013 (November 17, 2016). See Paul Cullen, "Ireland's Abortion Law Violated Woman's Human Rights, UN Says," *Irish Times*, June 13, 2017, https://www.irishtimes.com/news/health/irish-abortion-law-violated-woman-s-human-rights-un-says-1.3118145.

9 For discussion, see Alfred de Zayas and Áurea Roldán Martin, "Freedom of Opinion and Freedom of Expression: Some Reflections on General Comment No. 34 of the UN Human Rights Committee," *Netherlands International Law Review* 59, no. 3 (2012): 425–54; Devin Carpenter, "So Made That I Cannot Believe: The ICCPR and the Protection of Non-Religious Expression in Predominantly Religious Countries," *Chicago Journal of International Law* 18, no. 1 (2017): 216–44.

10 Office of the High Commissioner for Human Rights [OHCHR], CCPR General Comment No. 10: Freedom of Expression (Article 19) (June 29, 1983).

11 UNHRC, CCPR General Comment No. 34, ¶¶ 21–49.

12 General Comment No. 22, The Right to Freedom of Thought, Conscience and Religion (Art. 18), UN Doc. CCPR/C/21/Rev/Add.4 (1993), ¶ 32.

General Comment No. 34 looks at the application of Article 19(3) in specific areas. First, it considers the concept of political discourse.[13] Secondly, it assesses the regulation of the mass media, restrictions on internet publications, and the work of journalists.[14] Thirdly, it focuses briefly on counterterrorism measures that might interfere with free speech.[15] Fourthly, it deals with the issue of criminal libel laws.[16] It is notable that in all of these contexts, the UNHRC provides some analysis leading up to its conclusions. Its treatment of blasphemy, however, in paragraph 48 is strikingly different.

Whereas in the other contexts, it cautions against *excessive* application of the law in a way that would represent a disproportionate interference with the right to freedom of speech such as would go beyond what was permitted under Article 19(3), in paragraph 48 it concludes that blasphemy laws are *inherently* incompatible with Article 19(3). The UNHRC offers no reasoning in support of this, simply concluding that blasphemy laws are incompatible with the ICCPR unless they were justified under Article 20(2) thereof. Logically, because, of course, blasphemy laws can be enacted as a matter of statute and thus are prescribed by law, the UNHRC must either be saying that such a law cannot have a legitimate purpose or else that it can never be a necessary measure to achieve that purpose but unfortunately it did not explain the basis for its conclusion. The absence of reasoning in paragraph 48 is particularly stark given that there are multiple blasphemy laws in existence today, some of which—those for example in various Muslim-majority states—are regarded as important and necessary. It is simply not the case, in other words, that there is any genuine international consensus on this point.

It can be conjectured that the UNHRC's conclusion was probably based on a view that a blasphemy law cannot serve a legitimate purpose insofar as the ICCPR is concerned. Its reference to Article 20 of the ICCPR is particularly instructive in this regard. Article 20(2) provides that "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."[17] Hence the UNHRC's logic appears to be that blasphemy can only be restricted if and when it also amounts to advocacy of hatred constituting incitement to discrimination, hostility, or violence (and then, because it has these effects and not because it is blasphemous per se). This was also inherent in the 2012 Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence.[18] This plan of action endorsed the approach to blasphemy in General Comment No. 34,[19] but, whereas it referred to what it felt were the counterproductive

13 UNHRC, CCPR General Comment No. 34, ¶ 38.

14 UNHRC, CCPR General Comment No. 34, ¶¶ 39–45.

15 UNHRC, CCPR General Comment No. 34, ¶ 46.

16 UNHRC, CCPR General Comment No. 34, ¶ 47.

17 UNHRC, CCPR General Comment No. 34, ¶ 50: the UNHRC concludes that laws enacted pursuant to Article 20 must also comply with the requirements of Article 19(3).

18 See the Report of the United Nations High Commission for Human Rights on the Expert Workshops on the Prohibition of Incitement to National, Racial or Religious Hatred A/HRC/22/17/Add. 4 (January 11, 2013), https://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf. This report includes as an appendix the Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence (hereafter cited as Rabat Plan of Action). For discussion in the context of blasphemy laws, see Robert Kahn, "Rethinking Blasphemy and Anti-Blasphemy Laws," in Temperman and Koltay, *Blasphemy and Freedom of Expression*, 167–93. Generally, for endorsement of the values in this declaration, see Bielefeld, Ghanea, and Wiener, *Freedom of Religion or Belief*, 30, and especially 501.

19 Rabat Plan of Action, ¶ 17.

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and abusive nature of many blasphemy laws,[20] it did not consider the potential application of Article 19(3) to the issue—which, given that its focus was on Article 20, is not particularly surprising.

The manner in which the UNHRC linked the legitimacy of blasphemy laws to the question of whether they could be justified pursuant to Article 20(2) is problematic for two reasons.

First, as has been mentioned, Article 19(3) expressly permits states to restrict speech in the name of public morals, and there is no obvious reason why a blasphemy law could not be justified in the name of morals rather than in the name of preventing incitement to violence. This could only be the case, after all, if, objectively, it is impossible that a state could have a (public) moral objection to the "immoral treatment" of sacred things unless this also constituted advocacy of hatred, and the repeated statements *inter alia* from bodies like the Organisation of Islamic Cooperation indicate that this is simply not the case.[21]

Secondly, and relatedly, the UNHRC made no effort to address the critical question of *why* various states legislate for blasphemy (as it did with the other examples of controversial regulation of freedom of expression that it considered). Had it done so, it would have discovered that, in many cases, this is because of that process of moral prioritization[22] that operates on any occasion that a state restricts rights in the name of public morals. Naturally, the moral priorities of liberal, secular states will be fundamentally different to those of more religious states. The former will inevitably deem individual freedom to be morally more important than any concern with the sacred, and will, consequently, conclude that *irreligious* speech only warrants legal control if it has a negative societal impact that is unrelated to religion or if it impinges on the rights of others.[23] Furthermore, the removal of a concern with sacredness from the equation will mean that the rights of others that such states would regard as relevant cannot relate to some entitlement not to see the sacred being immorally treated. Rather they must be rights that involve no concern with the sacred—most obviously the right not to be the victim of incitement to hatred, violence, or discrimination.[24]

The latter kind of state (the non-secular), by contrast, may regard freedom of expression as being less valuable, on occasion, than the need to protect the sacred from morally inappropriate treatment.[25] Of course, this will involve judgments about what is sacred and what is morally appropriate that will impact on those who disagree with these judgements, but exactly the same thing will happen in relation to the judgments that will be made about what is morally unacceptable in a

20 Rabat Plan of Action, ¶ 19.

21 See, for example, the press release in relation to the Danish Cartoons controversy, Organisation of the Islamic Conference, Statement on Insulting Cartoons (2006), https://www.central-mosque.com/fiqh/oicsttmnt.htm. Generally, see Marie Juul Petersen and Heini í Skorini, "Freedom of Expression vs. Defamation of Religions: Protecting Individuals or Protecting Religions?" *Religion and Global Society* (blog), March 1, 2017, http://blogs.lse.ac.uk/religionglobalsociety/2017/03/freedom-of-expression-vs-defamation-of-religions-protecting-individuals-or-protecting-religions/.

22 See for discussion, Nazeem M. Goolam, "The Cartoon Controversy: A Note on Freedom of Expression, Hate Speech and Blasphemy," *Comparative and International Journal of Southern Africa* 39, no. 3 (2006): 333–50.

23 See, for example, Agnes Callamard, "Freedom of Speech and Offence: Why Blasphemy Laws Are Not the Appropriate Response," *Equal Voices*, no. 18 (June 2006): 7–12, https://fra.europa.eu/sites/default/files/fra_uploads/8-ev18en.pdf. See also Paul Sturges, "Limits to Freedom of Expression? The Problem of Blasphemy," *International Federation of Library Associations Journal* 41, no. 2 (2015): 112–19.

24 Generally (and in particular for discussion of whether such rights actually exist), see Jeroen Temperman, *Religious Hatred and International Law: The Prohibition of Incitement to Violence or Discrimination* (Cambridge: Cambridge University Press, 2016).

25 For discussion, see A. A. Mondal, "Articles of Faith: Freedom of Expression and Religious Freedom in Contemporary Multiculture," *Islam and Christian-Muslim Relations* 27, no. 1 (2016): 3–24.

secular society (hate speech, holocaust denial, and so on). Critically, however, for what I am (simplistically) terming a "religious state" the reality is that respect for the sacred *is* (or at least can be) an essential element of public morality. In other words, to the extent that Article 19(3) permits restrictions on freedom of speech in the name of public morals, a blasphemy law, in such a country, can serve a legitimate purpose. Once again, of course, this does not inherently legitimize the law from a human rights standpoint—it merely means that it serves a legitimate purpose—and a state will no doubt face a significant onus of proving that the law is necessary to achieve that purpose.

It is one thing for a secular state not to enact a blasphemy law because this would not be consistent with its public moral vision. What the UNHRC did in General Comment No. 34, however, was to deem the moral priorities of such secular states also to have *universal* legitimacy and the moral priorities of religious states to be universally illegitimate—an issue I consider in more detail below. This is profoundly problematic because there is simply no reason why the operation of international human rights law, with its claim to universality, *should* be governed in accordance with secular priorities—not least because large numbers of people and indeed states define themselves by reference to their religious identity. It is in this sense that the conclusions and analysis in paragraph 48 of the General Comment manifest an approach that threatens the integrity and legitimacy of *international* human rights law as a whole. I consider this point further in the final section of this article.

THE LINK BETWEEN PUBLIC MORALS AND BLASPHEMY LAW

The first limb of my argument, then, that there is no basis for deeming a blasphemy law to be *inherently* unacceptable as a matter of human rights law, is that that law *can* serve a legitimate purpose under the public morals ground for restricting international rights to freedom of expression.[26] This proposition is based on the inherent relationship between true blasphemy laws and public morality and it is to this issue that I now turn.

It is notoriously difficult to provide a clear and workable definition for what is blasphemous speech. It is accepted that it has something to do with religion (and might well be *irreligious*[27]), but that does not get us very far. It is also, often, the case that the kind of speech that is targeted by blasphemy laws will generally be *offensive* (at least to some people) in relation to some matter connected to religion. This gets us a bit further, but, quite clearly, significant questions of interpretation remain as to whether any particular speech is, in fact, blasphemous. There is, after all, a huge gulf, for example, between (a) that which the founder of Christianity purportedly did to commit blasphemy (agreeing with the leaders of the Jewish Sanhedrin that he was the Messiah and that they would see him coming on the clouds of heaven[28]); (b) that which the editor of *Gay News* magazine did in the early 1970s to commit the same offense (publication of a poem outlining certain homosexual acts perpetrated on the body of the crucified Jesus by the centurion at the foot of the cross[29]); and (c) that which is prescribed by Pakistan's blasphemy laws today.[30] If all of

26 See also Universal Declaration of Human Rights, article 29; American Convention on Human Rights, article 13.

27 Neville Cox, "The Freedom to Publish 'Irreligious' Cartoons," *Human Rights Law Review* 16, no. 2 (2016): 195–221. For an excellent response, see Koen Lemmens, "Irreligious Cartoons and Freedom of Expression: A Critical Reassessment," *Human Rights Law Review* 18, no. 1 (2018): 89–109.

28 Matthew 26:64.

29 Whitehouse v. Lemon [1979] AC 617.

30 Pakistan Penal Code §§ 295, 298. I discuss this below in the section "Public Morality, Necessity, and Blasphemy Laws."

https://doi.org/10.1017/jlr.2020.11 Published online by Cambridge University Press

these kinds of speech are blasphemous, then, on the face of it, it would seem very difficult to provide any clear definition of the term. Indeed, it is notable, as I discuss below, that in 1999, the Irish Supreme Court refused to give effect to an Irish constitutional provision demanding the criminalization of blasphemy on the express basis that it did not know how to interpret what blasphemy meant.[31]

The principal reason why it is difficult to give an exact answer to the question of whether, objectively, a particular utterance is blasphemous, however, is because this question cannot be answered in such an exclusively objective fashion. Blasphemy itself may be objectively defined as the treatment of sacred things in a manner that is morally unacceptable, but the assessment of whether something *is* morally unacceptable will, necessarily, be subjective—and will depend on the sensitivities, moral priorities, and overall worldview of any individual or any state that engages with the issue.

When a state enacts a blasphemy law, therefore (as distinct from a law that targets speech that might be blasphemous but for reasons unconnected to its blasphemous nature), it gives effect to three community views:

1. First, there is the view that the inappropriate treatment of the sacred should, on occasion, be regarded as morally unsayable.
2. Secondly, there is the view, now rejected in most secular states, that it is appropriate that morally unsayable speech about religion should also be legally prohibited.
3. Thirdly, there is the view that there is sufficient public consensus as to the types of speech that will be morally unsayable (and thus blasphemous) that (a) people can know, with some measure of certainty, what is illegal and (b) that the application of the law can safely be left in the hands of judges.

Of course, this process is not unique to blasphemy laws—one finds exactly the same thing with, for example, obscenity laws and even defamation laws, the operation of both of which will involve tribunals of fact assessing whether particular kinds of speech cross the thresholds of acceptability by reference to community standards.[32]

A further difficulty in interpreting what is meant by blasphemy, certainly from a legal standpoint, is that, as I discuss in the introduction, there might be multiple reasons why speech that is blasphemous is deemed illegal. The testimony of Jesus, after all, was arguably blasphemous, undoubtedly heretical (in the sense of representing a departure from orthodoxy), potentially treasonable (insofar as the Roman authorities were concerned[33]), threatening to public order, and probably disruptive of the interests of those who heard him. Clearly it is only the *blasphemous* elements of the speech that are relevant in demonstrating that it was, in fact, blasphemy. Nonetheless the legal definition of blasphemy has been, occasionally, distorted because of the fact that various so-called blasphemy laws have targeted speech *not* because it is blasphemous (that is, because it is disrespectful of the sacred), but because it generates other consequences. The old common law offense of blasphemy is a useful example of this in practice.

31 Corway v. Independent Newspapers (1999) 4 IR 484; (2000) 1 ILRM 426. For analysis, see Neville Cox, "Case and Comment: Corway v. Independent Newspapers," *Dublin University Law Journal*, no. 22 (2000): 201–07; Stephen Ranalow, "Bearing a Constitutional Cross—Examining Blasphemy and the Judicial Role in *Corway v Independent Newspapers*," *Trinity College Law Review*, no. 3 (2000): 95–110.

32 Chris Hunt, "Community Standards in Obscenity Adjudication," *California Law Review* 66, no. 6 (1978): 1277–92.

33 John 19:12.

This offense can be seen as having two distinct iterations.[34] In the first, the law's concern was not with religion per se, but rather with the fact that, in England, because the established Anglican Church was part of the fabric of the state, Anglican teaching was part of the law of the land, and hence speech that undermined or denied that teaching was a form of treason.[35] What was proscribed, therefore, was unorthodoxy (albeit that this unorthodoxy was also hugely offensive to many people). The old common law of blasphemy, therefore, was not really a blasphemy law at all (albeit that blasphemous material might have been caught by it) rather it was a law against sedition. From the late nineteenth century until it was abolished in 2008, the law became exclusively concerned with the interests of people in not being offended. The *target* of the law, therefore, became *scurrilous* rather than *unorthodox* speech—in that (on the reasoning of the courts) religious devotees would only reasonably be offended by this kind of speech.[36] This was closer to a blasphemy law than its predecessor (in that morally unsayable speech is also generally offensive), but it is notable that the law was not concerned with the fact that the speech was immoral per se, but rather with its impact on offended religious devotees.

What this means is that, in both these iterations, the law existed for a particular purpose but neither of these distinct purposes was focused on the question of whether the speech was, actually, blasphemous. This is a critical point; a law might suppress speech that many people (and the state) regard as blasphemous (in the sense of being morally unsayable) because it has a seditious impact or because it undermines the interests of others,[37] or, to reference the approach in paragraph 48 of General Comment No. 34, because it incites hatred or violence. If it does so, it is a law against sedition, a rights protector, or an incitement to hatred law. Indeed, the European Court of Human Rights, which does not appear to be particularly keen on engaging with the nature of religious devotion, has regularly upheld national laws that are termed "blasphemy laws" by reference to the more "worldly" negative consequences that such speech might provoke—threatening public order and undermining the rights and reputations of others.[38]

On the other hand, the only reason for a *blasphemy* law—rather than an incitement to hatred law—to exist (or rather, for a law to merit the sobriquet of a "blasphemy law") is to target speech *simply because it is, in fact, blasphemous*, in the sense of being morally unsayable. Indeed, it is this kind of law that seems to have been the focus of the UNHRC in General Comment No. 34 in that it spoke of the unacceptability of *prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws*. From the perspective of such a law, it is the morally unsayable nature of the speech that warrants its restriction and there is no need to find any ancillary reason to justify such a step. This is why the concept of a blasphemy law, harkening back as it does to

34 See Courtney Kenny, "The Evolution of the Crime of Blasphemy," *Cambridge Law Journal* 1, no. 2 (1922): 127–42; Paul O'Higgins, "Blasphemy in Irish Law," *Modern Law Review* 23, no. 2 (1960): 151–66.

35 *Taylor's Case* (1676) 1 Vent. 293; 3 Keble 607 (1676). See Leonard W. Levy, *Treason against God: A History of the Offense of Blasphemy* (New York: Schocken Books, 1981), 312; Louis Blom-Cooper, *Blasphemy: An Ancient Wrong or a Modern Right?* (London: Essex Hall Press, 1981), 3; Richard Webster, *A Brief History of Blasphemy: Liberalism, Censorship and the Satanic Verses* (Southwold: Orwell Press, 1990), 23; Kenny, "The Evolution of the Crime of Blasphemy," 130.

36 Bowman v. Secular Society (1917) AC 406; R v. Bradlaugh (1883) 15 Cox CC, 23; R v. Ramsay & Foote (1883) 15 Cox 217.

37 For assessment of the possibility of blasphemous speech representing a threat to the right to religious freedom of those who are offended by it see Andrew Hambler, "Blasphemy, Religious Rights and Harassment: A Workplace Study," in Temperman and Koltay, *Blasphemy and Freedom of Expression*, 681–700.

38 See E.S. v. Austria (2018) Eur. Ct. H. R. 891; Gay News and Lemon v. United Kingdom, 5 Eur. H.R. Rep 123 (1983); Otto-Preminger-Institut v. Austria (1994) Eur. Ct. H. R. 13470/67; Wingrove v. United Kingdom (1996) Eur. Ct .H. R. 17419/90; IA v. Turkey (2005) Eur. Ct. H. R. 590.

biblical times or to the stoning scene in Monty Python's *Life of Brian*, seems so anachronistic to a modern, secularised audience. This is not to say, as is regularly suggested, that such a law attempts the ludicrous task of protecting God from the barbs of humans.[39] Rather, the speech is sufficiently immoral (having regard to the priorities of the hearer) that it exceeds all thresholds of tolerance and becomes "unsayable."[40]

The notion of a society putting the mere utterance of certain words off limits is not, of course, an unusual phenomenon. An equivalent in secular, Western society generally, is perhaps the so-called and equally unsayable "n-word"—which is unacceptable (though generally not unlawful) irrespective of the context in which it is uttered (indeed, it is notable that I use the term the "n-word" rather than the word itself[41]). The moral "unsayability" of certain things is, also arguably, the best explanation for German Holocaust denial laws[42] and indeed of many European hate speech laws.[43] In other words, in post-religious or nonreligious societies, whose public moralities are based around concerns with respect for dignity and human rights as well as particular localized factors arising from their histories, these things have replaced blasphemies as terms that are profoundly unacceptable insofar as collective moral values are concerned.

Of these, the "n-word" is perhaps the most illustrative. There are, of course, many reasons why, in twenty-first-century Western society, this term is dislikable,[44] most obviously in that it links to slavery and the systematic dehumanisation of African Americans—something in relation to which western society now, quite rightly, feels deep shame and guilt. What is interesting, however, is the power of the word itself. After all, the terms *slave*, *black slave*, or even the statement "I believe in slavery" presumably harken back to this awful period in Western history, but whereas someone expressing such views might well be censured for so doing, none of these phrases is unsayable in the same way as is the unspeakable "n-word." Let us imagine, after all, a situation where a (hypothetical) white Nobel Peace Prize winner, who had worked tirelessly for the rights of African Americans, gave an acceptance speech and said that "the greatest development in global twentieth century politics was the emancipation of the . . ." and then concluded by using the "n-word." Such a speech might be utterly free of any underlying racism, and indeed the person's life's work might have been dedicated to the fight against racism (in other words, in his or her speech, the word was clearly not used in any derogatory fashion). Nonetheless, it is surely the case that the mere use of the word would attract vehement criticism and lead people to rethink their opinion of the individual. For, like the blasphemies of old, the "n-word" has an intangible magic power in today's society—a

39 See Michael Nugent, "If There Was a Creator of the Universe, It Wouldn't Need Its Feelings Protected by Dermot Ahern" *The Journal.ie* (blog), May 7, 2017, http://www.thejournal.ie/readme/if-there-was-a-creator-of-the-universe-it-wouldnt-need-its-feelings-protected-dermot-aherns-laws-3376833-May2017/.

40 See Joel Feinberg, *Offense to Others* (Oxford: Oxford University Press, 1985), 50–97. Feinberg distinguishes what he terms "simple offense" (one's senses are targeted) from profound offense (one's moral sensitivities are offended). See also Neville Cox, "Blasphemy, Holocaust Denial and the Control of Profoundly Unacceptable Speech," *American Journal of Comparative Law* 62, no. 3 (2014): 739–74.

41 On the other hand, in July 2017, the Irish journalist, Kevin Myers discovered to his cost (and at the cost of his job) that speech that might be construed as anti-Semitic is also, arguably, "unsayable" in Western European society. See Fintan O'Toole, "Kevin Myers Broke the Only Rule that Matters," *Irish Times,* August 1, 2017, https://www.irishtimes.com/opinion/fintan-o-toole-kevin-myers-broke-the-only-rule-that-matters-1.3172618.

42 Cox, "Blasphemy, Holocaust Denial and the Control of Profoundly Unacceptable Speech," 754; Neville Cox, "The Ethical Case for a Blasphemy Law," in *The Handbook of Global Communications and Media Ethics*, ed. Robert Fortner and Mark Fackler (Malden: Wiley-Blackwell, 2011), 263–97, at 264.

43 See Gündüz v. Turkey [2003] Eur. Ct. H.R. 652; Erbakan v. Turkey, App No. 59405/00 Eur. Ct. H.R. (2006).

44 See, for example, *Washington Post*, "The N-Word: An Interactive Project Exploring a Singular Word," accessed March 16, 2020, https://www.washingtonpost.com/wp-dre/features/the-n-word.

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power so dramatically to offend against public morality that society deems it to be simply unsayable.

The analogy between the "n-word" and illegal blasphemy is of course imperfect. In the first place, it is generally not illegal to use the "n-word" unless it constitutes hate speech. In the second, there are different moral reasons why things like holocaust denial or the "n- word" are unsayable from those that explain why, in a religious society, blasphemy may be unsayable. The connection that I am making between the two, however, is simply to illustrate the fact that it is not merely religious societies that will regard certain things as being morally (and possibly, as a result, legally) unsayable. For reasons fundamental to either society (the religious or the secular), and, whether or not their use is illegal, such terms strike at something that is essential to the moral core of that society such that they are profoundly morally unacceptable, and this, in turn, leads to the state deeming them to be unsayable and, possibly, legislating against them.[45]

This generates two important consequences insofar as this discussion of blasphemy law is concerned. First, and most importantly, a blasphemy law represents a response triggered by a nation's public moral vision (to the extent that this can be identified—something discussed in the next section) and thus serves a legitimate purpose insofar as Article 19(3) of the ICCPR is concerned. Secondly, it will inevitably be the case, if a nation's public morality is outraged by blasphemy, that that public morality will be a deeply religious one (albeit that many states, such as Ireland, maintained blasphemy laws for years after their public morality was neither religious nor outraged by blasphemy). This is not, of course, to say that *all* religious societies will wish to prohibit blasphemy nor even that *all* religious people will be offended by any particular allegedly blasphemous speech. It is simply that a secular state with a secular public morality will not regard blasphemous speech as morally unsayable (though it may be concerned for the interests of those who will be offended as a result).

On the face of it, therefore, a religious society of this kind might legitimately claim that its enactment of a blasphemy law represents a restriction on free speech in the name of the legitimate purpose (within Article 19(3) of the ICCPR) of protecting public morality. If this claim is to be rejected, as it appears to be in General Comment No. 34, then I would suggest that this must be on one of two bases. Either the UNHRC is denying the possibility that, factually, a society might have a public moral objection to blasphemy or else, more probably, it is implying that a public moral vision that would ground a blasphemy law is itself morally unacceptable insofar as human rights law is concerned. In the next section, I evaluate both of these two arguments.

BLASPHEMY, PUBLIC MORALITY, AND THE PROBLEM OF UNPROVABILITY

The "public morals" ground for restricting rights is, arguably, inherently troubling and for at least two reasons. First, unlike the *other* bases for restricting rights in the ICCPR (to protect, for example, public order, public health, or the rights of others), there is no tangible way to assess whether a particular action actually *does* constitute a threat to public morals or to disprove a claim by a state that this *is* the case.[46] In theory, in other words, a state could impose wholesale restrictions on

45 See generally, on the issue of the role of law in protecting the "moral essentials" of a society, Basil Mitchell, *Law, Morality and Religion in a Secular Society* (Oxford: Oxford University Press, 1967), 21–22.

46 Generally, see Roberto Perrone, "Public Morals and the European Convention on Human Rights," *Israel Law Review* 47, no. 3 (2014): 361–78. See also Robert George, "The Concept of Public Morality," *American Journal of Jurisprudence* 45, no. 1 (2000): 17–32; Christopher F. Mooney, "Public Morality and Law," *Journal of Law and Religion* 1, no. 1 (1983): 45–58.

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forms of expression that it regards as unsettling or critical and, if challenged before human rights tribunals, could seek to rely on a stock response that the speech ran contrary to public morals. Secondly, the public morals ground for limiting rights could, in theory, be used to justify the enforcement of sectarianism and prejudice, and the oppression of those who do not defer to the majoritarian moral vision.[47] Therefore, when a state seeks to justify any law (including a blasphemy law) by reference to public morals, it is necessary for the relevant adjudicative body to assess whether the state *does* actually have a public moral objection to the speech in question and, if so, whether what is at stake *is* morality rather than prejudice or some political agenda. Indeed, more controversially, it may involve an assessment of the universal moral legitimacy of the public moral vision in question. I consider these two issues in this section.

Critically, however, and irrespective of how inconvenient or unmanageable the public morals ground for limiting rights is, this cannot gainsay the fact that it *does* exist within the ICCPR (and the European Convention on Human Rights). In other words, the problems connected with it cannot be a justification for not applying it—and indeed cannot be a justification for constructing artificial barriers to its operation. Put simply, if a blasphemy law *can* be justified by reference to a nation's public morals, then it would be quite wrong of a body like the UNHRC to deny this possibility because it does not like the notion of such a law.

Identifying a Nation's Public Morality

What then *is* "public morality"? In the words of the European Court of Human Rights, it is a vision representing "the moral ethos or moral standards of a society as a whole."[48] It can also be suggested that the experience, certainly of Western societies, is that a nation's *public* morality is capable of change, and indeed it is entirely possible for one kind of moral vision to be replaced, over time, by a diametrically opposed kind. Beyond this, however, because morality is something that transcends rational explanation, the concept is difficult to quantify.

Perhaps the better approach therefore, is not to seek to define public morality but rather to look for the *indicators* of the state of a nation's public morality. Lord Devlin in his justly famous argument as to why a nation should not rule out, as a matter of principle, the possibility of regulating private moral choices (that is, choices that have no direct impact on another person) suggested that what was important were the views of the person in the jury box.[49] Despite H. L. A. Hart's criticism that such an approach would likely generate counter-rationalist prejudice rather than morality,[50] it *is* arguably true to say that where popular discourse in support of a particular moral proposition is sufficiently widespread and has sufficient public support, this is at least evidence that the proposition can be seen as an element of *public* morality. Similarly, the extent to which a particular moral proposition receives support through national legislation will also be relevant.[51] Finally, and perhaps most importantly, to the extent that a national constitution can be seen as a

47 See, for example, Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), 248. See also Perrone, "Public Morals," 369.

48 Dudgeon v. United Kingdom [1981] Eur. Ct. H.R. 5 at ¶ 49.

49 Patrick Devlin, *The Enforcement of Morals* (Oxford: Oxford University Press, 1965), 15.

50 H. L. A. Hart, "Immorality and Treason," *Listener* (1959): 162–67. See also Graham Hughes, "Morals and the Criminal Law," *Yale Law Journal* 71, no. 4 (1961): 662–83, 675.

51 See Mooney, "Public Morality and Law," 46, for the proposition that law becomes a minimum but necessary statement as to the nature of a state's public morality.

repository of the most deeply held values in a society, the constitutional encapsulation of that proposition will, in general, be strong evidence that it forms part of the nation's public morality.

Critically, however, all of these factors are simply evidence of the state of the nation's public morality—and not necessarily determinative on the point. As is discussed below, after all, until very recently, Ireland's constitution required the criminalization of blasphemy. Equally, as I discuss below, there are multiple factors indicating that, for probably the last thirty years of the existence of the constitutional reference to blasphemy, Irish public morality far from supporting the existence of a blasphemy law was actually strongly opposed to it—and it is frankly inconceivable that any Irish government certainly in the twenty-first century, would have sought to defend its constitutional reference to blasphemy before a human rights tribunal. In this sense, one of the strongest pieces of evidence that something forms part of a nation's public morals is that a state will be prepared to argue, for example before an international human rights tribunal, that this is the case. If it does, and because of the unprovability of "morality," it may be very difficult for an international tribunal to go beyond this claim.

Given the amorphous and undefined nature of the *concept*, moreover, a very real question arises as to whether an international tribunal, in considering the legitimacy of a law that is allegedly grounded in public morality, should, in practice, be limited to an assessment of whether it fulfils the *other* requirements of human rights law (namely that it is prescribed by law and necessary in a democratic society) and should only engage with the question of whether it serves a legitimate purpose if there is compelling evidence against such a claim. In other words, if a state claims that its blasphemy law *is* grounded in its public morality, it is arguable that an international tribunal should only reject this claim in extreme circumstances.

Perhaps for this reason, the European Court of Human Rights has, in effect, declined to define the concept of public morality preferring to leave this within the margin of appreciation afforded to member states.[52] It has expressly rejected the notion of a "European conception of morals"[53] holding that, because the state is generally better placed to make a determination as to the content of its public morality than *it* is, therefore this is precisely the kind of context in which its margin of appreciation doctrine should apply.[54] Thus, whereas it has often rejected state arguments that a law is *justified* in the name of public morality,[55] the Court has never questioned the state's argument about the *content* of its public morality. Indeed, Roberto Perrone argues, "This is a critical aspect of the Court's jurisprudence in the area of public morals."[56]

This partially explains why the European Court has always concluded that a restriction on blasphemous speech was a justifiable interference with the right to freedom of expression under Article 10 of the Convention.[57] Indeed, it is not merely in blasphemy cases that this deference to existing state policy can be observed; rather it is manifest generally in cases involving speech dealing with

52 For criticism see Perrone, "Public Morals and the European Convention," 363–365.

53 Handyside v. United Kingdom [1976] Eur. Ct. H.R. 5493/72 at ¶ 48.

54 *Handyside* [1976] Eur. Ct. H.R. at ¶ 48; see Perrone, "Public Morals and the European Convention, 363.

55 See most obviously Dudgeon v. United Kingdom, [1981] Eur. Ct. H.R. 5; Norris v. Ireland [1985] Eur. Ct. H.R. 13. Generally see Perrone, "Public Morals and the European Convention," 364.

56 Perrone, "Public Morals and the European Convention," 365.

57 See E.S. v Austria [2018] Eur. Ct. H.R. 891; Gay News and Lemon v. United Kingdom, 5 Eur. H.R. Rep 123 (1983); Otto-Preminger-Institut v. Austria [1994] Eur. Ct. H.R. 26 (Sept. 20, 1994); Wingrove v. United Kingdom [1996] Eur. Ct. H.R. 60; IA v. Turkey, 2005-VIII Eur. Ct. H.R.; Aydin Tatlav v. Turkey Application no. 50692/99 (May 2, 2006) [In French or Turkish]. Generally, see Robert Wintemute, "Blasphemy and Incitement to Hatred under the European Convention," *King's College Law Journal*, no. 6 (1995–1996): 143–46.

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religious issues, including anti-Semitic speech[58] and religious advertising.[59] It is tempting, however, to suggest that the Court's jurisprudence in these cases reflects a more general policy of declining to tell a state what to do when religion is on the line. Thus, whether the case involves an applicant seeking to exercise his or her right to manifest religion in public in a manner that is repugnant to national policy,[60] or the state seeking to curtail someone's rights in order to enforce a religiously based public policy,[61] the Court will generally defer to the state's wishes. In practice, it does so by pointing both to a perceived absence of international consensus on such issues[62] and, more importantly, to the fact that these are issues on which a state may be best placed to make an effective decision,[63] as justifications for allowing that state a very wide margin of appreciation as to how it will regulate the particular issue.

The Moral Legitimacy of a Religious Public Morality

The approach of the UNHRC (which of course does not apply a margin of appreciation doctrine[64]) is radically different, and in it we find an endorsement of the second concern identified at the beginning of this section—namely that any evaluation of whether a law, allegedly grounded in public morals, serves a legitimate purpose insofar as international human rights law is concerned, must entail an assessment of whether the relevant public morality is, itself, morally acceptable when judged against some sort of universal moral standard. It is on this basis that the UNHRC has deemed the kind of public morality that could justify a blasphemy law to be illegitimate. Hence, in its General Comment 22 (upon which it relied in General Comment 34)[65] in dealing with freedom of conscience, it concludes, "The concept of morals derives from many social, philosophical, and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition."[66]

There are three points to make about this conclusion, which was, no doubt, well intentioned and aimed at protecting members of religious minorities from oppression. First, it is made in relation to freedom of conscience, and obviously different considerations may arise where the protection of

58 M'Bala M'Bala v. France [2015] Eur. Ct. H.R. No.25239/13 (October 20, 2015). For analysis, see Frank Cranmer, "Article 10 ECHR Does Not Protect Anti-Semitic Views: *M'Bala M'Bala v France*," *Law & Religion UK* (blog), November 13, 2015, http://www.lawandreligionuk.com/2015/11/13/article-10-echr-does-not-protect-anti-semitic-views-mbala-mbala-v-france/.

59 Murphy v. Ireland [2003] Eur. Ct. H.R. 352.

60 See generally on this issue, Carolyn Evans, "Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture," *Journal of Law and Religion* 26, no. 1 (2010): 321–43. This is most controversially the case where a woman seeks to challenge a ban on wearing some kind of Islamic veil either in public (SAS v. France [2014] Eur. Ct. H.R. 695; Affaire Belcacami & Oussar v. Belgium [2017] Eur. Ct. H.R. 655) or in some more particular setting (Leyla Sahin v. Turkey [2005] Eur. Ct. H.R. 819).

61 See most notably Lautsi v. Italy [2011] Eur. Ct. H.R. 242.

62 See Aaron R. Petty, "Religion, Conscience, and the European Court of Human Rights," *George Washington International Law Review* 48, no. 4 (2016): 807–51, at 836.

63 See *SAS* [2014] Eur. Ct. H.R., at ¶ 12.

64 UNHRC, General Comment No. 34, ¶ 36. See Dominic McGoldrick, "A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee," *International and Comparative Law Quarterly* 65, no. 1 (2016): 21–60.

65 UNHRC, General Comment No. 22, The Right to Freedom of Thought, Conscience and Religion (Art. 18), UN Doc. CCPR/C/21/Rev.1/Add.4 (1993), https://undocs.org/CCPR/C/21/Rev.1/Add.4.

66 UNHRC, General Comment No. 22, ¶ 8.

freedom of expression under Article 19 of the ICCPR is at stake. Secondly, it is not clear what is meant by "a single tradition"—whether, in other words, it refers to an entire religion, or a school of thought within a religion. Finally, and most importantly, it can be argued that this (unreasoned) proposition, while presented as universally applicable and as being aimed at protecting religious minorities, actually reveals both a fundamental misunderstanding of the nature of moral judgment and also a disturbing secular bias in the interpretation of a human rights treaty that was supposed to be universal in nature.

General Comment No. 22 offers no justification for linking its factual proposition that the concept of morals derives from many social, philosophical, and religious traditions (a meaningless platitude reflecting the obvious point that there are a multitude of different sources from which any individual or state *might* draw morality) to its conclusion that, as a result, public morality *must* accommodate a multiplicity of traditions. Its approach is disconnected from the reality of the concept of morality itself (a deep analysis of the nature of which is well beyond the scope of this article), which represents a determination, however controversial, non-pluralist or unpopular, by a state or an individual, as to the empirical difference between right and wrong—and a rejection of opposing determinations. In setting conditions for what it sees as a "valid" public morality, the UNHRC is undermining the concession that the ICCPR clearly affords to states: that rights can be limited by reference to what their *actual* public morality is; that is their moral vision chosen as a perceived matter of truth from among all of the competing moral visions that are available.

For individuals and states, in other words, morality is about what *they* see as right and wrong, not a basket containing the answers that *other* traditions or societies give to these complex questions. Furthermore, the simple reality is that in many states (and the Islamic states are the most obvious contemporary examples) the purportedly objective public morality which they characterize as truth, *does* derive exclusively or largely from a religious tradition—be it Islam generally or one branch of Islam specifically—and denies the possibility that moral truth can be found anywhere but in God.[67] There is nothing either rational or contrived about such moral determination (and that is why the conditions imposed by General Comment 22 are so misplaced), rather it reflects the intuitive vision of a society as to the content of universal truth—whether that be the truth of republican secularism in France or the truth of Islam in Pakistan. Obviously, this is not to say that a state should be permitted to do whatever it wants in the name of its public moral vision —the requirement that its laws also satisfy the test of necessity continues to apply. It is merely to say that there is no basis for the UNHRC's view that public morality, by definition, must be drawn from a multiplicity of sources.

What, though, of the proposition that, even if a nation's public morality *is* de facto based on a single religious tradition, such a public morality would be morally unacceptable insofar as human rights law is concerned? There are two key reasons why such a proposition should be resisted, certainly to the extent that it is endorsed by a body like the UNHRC. First, there is absolutely nothing in the ICCPR that would authorize or justify such a body in making such an evaluation. The concession in, for example, Article 19(3) is to a nation's public morality *simpliciter*, not to a public morality that can be endorsed by a secular, interpreting body. Secondly, moreover, if such an evaluation of overarching moral legitimacy were to have meaning, then it would need to be made by reference to some clear, universally applicable moral yardstick—but none is available.

67 Thus in John 14:6, the founder of Christianity is recorded as having said of himself "I am the Way; I am truth and life. No one can come to the Father except through me." *New Jerusalem Bible* (London: Darton, Longman & Todd, 1990). Similarly, the Muslim *Shahada* (profession of faith) provides that "There is no god but God and Muhammad is the messenger of God."

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The point is that morality, either religious or nonreligious, is not objectively provable.[68] Rather what matters is the sincerity of the belief of those who believe it to be true. The UNHRC might prefer a *secular* public morality to a religious one, but it has no basis for concluding that, as matter of truth, the former is more legitimate than the latter. Nor indeed, does it have any basis for concluding that a secular public morality is likely to be more inclusive of those who oppose it than is a religious one. No doubt, those who wish to commit blasphemy in a religious state will be oppressed by a moral vision that tells them that this is morally unacceptable, but of course, people who wish to engage in anti-Semitic hate speech in many European countries will be similarly oppressed. Even more starkly, the operation of that profoundly secular public moral vision, the French approach to *laïcité*, is profoundly oppressive of, for example, women who wish to manifest their religious beliefs in public through wearing Islamic face veils.[69] In other words, not merely did General Comment No. 22 mischaracterize the nature of morality, it also, and more worryingly, seemed to measure the universal moral legitimacy of "public moralities" by reference to a secular worldview that was itself morally controversial and unprovable.

Tangentially, if the concern of the UNHRC was with the prospect of minority religious groups being oppressed and abused by a dominant religious majority, there was no need for it to address this concern by imposing unrealistic limitations on the definition of morality. As I discuss in the next section, after all, for a law to be human-rights compliant, it must also be *necessary* and a law that is used to target minority groups in society because of their religious beliefs will not pass this test—irrespective of the extent to which such a law is, factually, grounded in the public moral vision of the nation. Hence, for example, if a state sought to prohibit *all* irreligious speech or indeed (and more probably) the exercise of their religion by members of religious minorities, then this would not be human-rights compliant. Critically, however, this is the case because the law would represent an excessive interference with freedom of expression or freedom of religion *irrespective* of whether the state's public moral vision endorsed such a law—and not because it was unacceptable still less impossible, by definition, for a state to have a public moral vision of this kind. Indeed, it is worth noting that the Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR make it clear that the limitation clauses cannot be interpreted "so as to jeopardize the essence of the right concerned."[70]

This all being the case, it is submitted that, unless there is strong competing evidence, an international tribunal has no basis either to go beyond a claim by a state that a particular law is grounded in its public morality or to deem a public morality that would ground a blasphemy law to be, itself, morally unacceptable. In particular, for present purposes, where a state claims that reverence for God and objection to unsayable blasphemies forms a key element of *its* public morality, then this must, in general, be accepted, and with it, the proposition that a blasphemy law can, at least in principle, be seen as serving a legitimate purpose under Article 19(3) of the ICCPR.

68 See, for example, Chris Heathwood, "Could Morality Have a Source?," *Journal of Ethics and Social Philosophy* 6, no. 2 (2012): 1–19.

69 See Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law 2010-1192 of October 11, 2010 Prohibiting the Concealment of the Face in Public Space], Journal Officiel de la République Française [Official Gazette of France], October 12, 2010, https://www.legifrance.gouv.fr/eli/jo/2010/10/12. See generally Neville Cox *Behind the Veil: A Critical Analysis of European Veiling Laws* (Cheltenham: Edward Elgar Publishing, 2019).

70 Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, U.N. Doc. E/CN.4/1985/4 (1984).

https://doi.org/10.1017/jlr.2020.11 Published online by Cambridge University Press

PUBLIC MORALITY, NECESSITY, AND BLASPHEMY LAWS

As I mention in the introduction, the approach of the UNHRC, in ruling absolutely against the legitimacy of blasphemy laws, must have been based either on a view that such laws *cannot* serve a legitimate purpose or on the view that such laws *cannot* represent proportionate responses to such a purpose. Having argued in previous sections that a blasphemy law certainly *could* serve a legitimate purpose, I now turn to the question of whether such a law must inevitably represent a disproportionate and unnecessary interference with the right to freedom of expression.

There are, as I discuss below, examples of contemporary blasphemy laws that involve extremely severe penalties and that are enforced in a context where rights of fair procedures (and often the rule of law itself) are wantonly ignored. Whether or not laws of this kind are directed to a legitimate purpose, they will not be human-rights compliant because they would fail the test of necessity. Necessity, in this sense, requires that there be a proportionate link between the law and the legitimate purpose it serves, and, arguably, that the law, even if it *is* proportionate, does not involve an excessive interference with rights. Thus, a law that is excessively draconian or that involves widespread abuses of rights including but not limited to the right to right to freedom of expression (for example, rights to due process or freedom of conscience) cannot be "necessary" and hence cannot be justified from a human rights standpoint.[71]

No doubt, there are many such "unnecessary" blasphemy laws (and my arguments do not seek to justify the existence of any particular blasphemy law). No doubt, also, a state will have a heavy onus to discharge in showing that a blasphemy law *is* necessary, given that, for example, the European Court of Human Rights has consistently insisted that the right to freedom of expression includes a freedom to shock, offend, and disturb[72] and that there be a heightened protection for the expression of opinions.[73] This is why a statute that criminalized mere criticism of a religion or the expression of unorthodox views would inevitably be deemed to be a disproportionate response to a public morals concern. On the other hand, the question remains as to why a blasphemy law that *is* grounded in public morality and is *not* excessively draconian should not be legitimate as a matter of human rights law. If, in other words, a state regards the need to protect the sacred as a foundational element of public morality, why must a *measured* blasphemy law invariably be a disproportionate interference with the right to freedom of expression?

I explore this issue now through analysis of two very different laws: that in operation until very recently in Ireland and that which currently exists in Pakistan. I submit that neither law should be deemed to be human-rights compliant but for different reasons; the Irish law was far from draconian but was not grounded in public morality; the Pakistani law *is* grounded in public morality but is draconian and associated with multiple human rights abuses. On the other hand, a law that combined the imperative from public morality in Pakistan and the leniency of the former Irish law is arguably the ultimate test of whether the UNHRC's conclusions in General Comment No. 34 are correct.

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71 This is explicit in the Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR.

72 Handyside v. United Kingdom, 1997-III Eur. Ct. H.R.

73 See Lingens v. Austria (No.2) [1986] 9815/82 Eur. Ct. H. R. 7 1, 15 (1986); Bladet Tromso and Stensaas v. Norway [1999] Eur. Ct. H. R. 29 at ¶ 66; Feldek v. Slovakia [2001] Eur. Ct. H. R. 463 at ¶ 75; Pedersen v. Denmark [2004] Eur. Ct. H. R. 693 at ¶ 64; Selisto v. Finland [2004] Eur. Ct. H. R. 634 at ¶ 55, Turhan v. Turkey [2005] Eur. Ct. H. R. 311 at ¶ 24, Ukrainian Media Group v. Ukraine [2005] Eur. Ct. H. R. 198 at ¶¶ 59–62; Wirtschafts-Trend Zeitschriften-Verlags Gmbh v. Austria [2005] Eur. Ct. H. R. 862 at ¶ 32; Semik-Orzech v. Poland [2011] Eur. Ct. H. R. 923; Sorguc v. Turkey [2009] Eur. Ct. H. R. 979; Bodrozic v. Serbia [2009] Eur. Ct. H. R. 978; Dlugolecki v. Poland [2009] Eur. Ct. H. R. 345.

https://doi.org/10.1017/jlr.2020.11 Published online by Cambridge University Press

Ireland: A Lenient Blasphemy Law at Odds with Public Morality[74]

In 2009, Ireland enacted a new Defamation Act,[75] which, to the widely expressed horror of many people, gave definition to the crime of blasphemy.[76] It would appear that the government of the day felt obliged to take this step because, between 1937 and 2018, the Irish Constitution required that the publication of blasphemy be a crime.[77] The highly religious nature of the original Irish Constitution[78] is understandable when one considers the nature of the Ireland of 1937. At the time, after all, the country was profoundly influenced by Roman Catholic social teaching,[79] and the revolution that led to Irish independence had both nationalistic *and* religious roots.[80] The highly influential *taoiseach* (prime minister) of the time, Éamon De Valera was, undoubtedly, a devout Roman Catholic, but he was primarily a liberal democrat, and he appears to have taken the view that the confessional and Roman Catholic[81] content of the constitution was appropriate because this represented the democratic will of the vast majority of people.[82]

It is this that explained the inclusion, in the 1937 Constitution, of a statement that "the publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law."[83] What this meant (given the mandatory nature of the relevant clause), was not that the criminalization of blasphemy was merely constitutionally acceptable in Ireland, but that it was constitutionally *required*. In other words, if blasphemy was to be

74 For a general overview, see Katherine Rollinson, "An Analysis of Blasphemy Legislation in Contemporary Ireland and Its Effects upon Freedom of Expression in Literary and Artistic Works," *Syracuse Journal of International Law and Commerce* 39, no. 1 (2011): 189–218.

75 Defamation Act 2009 (Act. No. 31/2009), http://www.irishstatutebook.ie/eli/2009/act/31/enacted/en/. See generally, Neville Cox and Eoin McCullough, *Defamation: Law and Practice* (Dublin: Clarus Press, 2014), 4; Irish Law Reform Commission, "1991 Report on the Civil Law of Defamation," December 19, 1991, at 54, https://www.lawreform.ie/_fileupload/Reports/rDefamation.htm; "Report of the Legal Advisory Group on Defamation" (legislation, European Union, 2003), 5–9.

76 Defamation Act 2009, § 36; see Katherine Jacob, "Defending Blasphemy: Exploring Religious Expression under Ireland's Blasphemy Law," *Case Western Reserve Journal of International Law* 44, no. 3 (2012): 803–45.

77 See Neville Cox, *Blasphemy and the Law in Ireland* (Lewiston: Edwin Mellen Press, 2000), 47; Neville Cox, "Sacrilege and Sensibility: The Value of Irish Blasphemy Law," *Dublin University Law Journal*, no. 19 (1997): 87–112.

78 See, for example, Constitution of Ireland, article 6 (all powers of government derive from God); Constitution of Ireland, article 44 (acknowledgement that the homage of public worship is owed to God).

79 Tom Inglis, *Moral Monopoly: The Rise and Fall of the Catholic Church in Ireland* (Dublin: University College Dublin Press, 1998); Louise Fuller, *Irish Catholicism since 1950: The Undoing of a Culture* (Dublin: Gill & MacMillan, 2004); Bryan Fanning, *Histories of the Irish Future* (London: Bloomsbury, 2015), 174; Paul Christophe Manuel, *The Catholic Church and the Nation-State Comparative Perspectives* (Washington, DC: Georgetown University Press, 2006), 117–28.

80 Féilim Ó hAdhmaill, "The Catholic Church and Revolution in Ireland," *Socialist History*, no. 43 (2013): 1–25; Richard English, *Irish Freedom: The History of Nationalism in Ireland* (London: Macmillan, 2006), 219.

81 Constitution of Ireland article 44 §1.2 provided that "The State recognizes the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of citizens"; Constitution of Ireland article 44 §1.3 further recognized the Church of Ireland, the Presbyterian and Methodist churches, the Society of Friends in Ireland, the Jewish Congregations, "and the other religious denominations existing in Ireland at the date of the coming into operation of this Constitution."

82 For a magisterial account of these developments, see Gerard Hogan, *The Origins of the Irish Constitution, 1928–1941* (Dublin: Royal Irish Academy, 2012); see Dermot Keogh and Andrew J. McCarthy, *The Making of the Irish Constitution 1937* (Douglas Village: Mercier Press, 2007).

83 Irish Constitution, article 40 § 6.1; see generally Cox, *Blasphemy and the Law in Ireland*, 48; Gerard Hogan and Gerry Whyte, *JM Kelly: The Irish Constitution* (Dayton: LexisNexis Butterworths, 2003), 7.5.70.

decriminalized in Ireland this would require the constitution to be amended by way of popular referendum. Moreover, it seems clear that the focus of the clause was on the blasphemous content of a publication per se, and not the potential other negative consequences (threats to public order or the rights of others) that might flow from blasphemy. Article 40.6.1—the clause that protects free speech—already permitted limitations on speech in order to deal with these concerns. Hence, it can be concluded that the reference to blasphemy was included, quite simply, because the people who promulgated and voted for the constitution did not think blasphemous speech should be permitted.

As it happens, a referendum to abolish the so-called blasphemy clause was put to the people of Ireland in October 2018 and was passed convincingly.[84] Indeed, what was most remarkable about this was how little interest and debate the issue generated (in a year that had also seen a far more controversial Irish constitutional referendum dealing with the issue of abortion). Rather, for many people (and probably for the Irish government) the constitutional referendum was something of a sideshow on a day on which the people were also asked to vote in presidential elections.[85]

On the other hand, in 2009, blasphemy *was* a crime in Ireland (even if it was not laid down by statute), because the Constitution said it was. Moreover there was a further imperative to legislate for blasphemy in that, in 1999 the Irish Supreme Court in *Corway v. Independent Newspapers (Ireland) Limited*[86] had effectively deemed the constitutional crime to be unenforceable and had, implicitly, called on the legislature to define it. In the background, however, there was a further and hugely important factor, namely that, by then, the impact of Roman Catholic teaching on Irish social policy (and Irish public morality) and the standing of the Catholic Church within Irish society had collapsed dramatically.[87]

Child abuse scandals, a new multiculturalism, membership of the European Union, the proliferation of liberalism, economic growth and, arguably, the increased education of the population may all have played a role in this change.[88] But what is beyond doubt is that, quite apart from the fact that most recent census figures indicate a significant decrease in those identifying as Catholic and a significant increase in those saying that they had no religious beliefs,[89] the impact of Roman Catholic teaching in Irish civic society has reduced exponentially since the early 1990s. Thus, whereas previously if the Vatican or Irish bishops had issued a teaching in relation to a particular topic this would be likely to generate a societal (and possibly a legal) change in support of this

84 The referendum was passed by a majority of 68.5 percent in favor and 31.5 percent against. See Emma Graham-Harrison, "Ireland Votes to Oust 'Medieval' Blasphemy Law," *Guardian*, October 27, 2018, https://www.theguardian.com/world/2018/oct/27/ireland-votes-to-oust-blasphemy-ban-from-constitution.

85 See "Blasphemy Referendum to Take Place on Same Day as Presidential Election," *Irish Examiner*, September 21, 2018, https://www.irishexaminer.com/breakingnews/ireland/blasphemy-referendum-to-take-place-on-same-day-as-presidential-election-870630.html.

86 [1999] 4 IR 484; [2000] 1 ILRM 426.

87 See Inglis, *Moral Monopoly*, 70; Jean-Christophe Penet, "From Idealised Moral Community to Real Tiger Society: The Catholic Church in Secular Ireland," *Estudios Irlandeses*, no. 3 (2008): 143–53; Mary Kenny, "The End of Catholic Ireland," *Guardian*, May 8, 2012, https://www.theguardian.com/commentisfree/belief/2012/aug/08/end-of-catholic-ireland.

88 For an excellent evaluation, see Eamon Maher and Eugene O'Brien, *Tracing the Cultural Legacy of Irish Catholicism: From Galway to Cloyne and Beyond* (Manchester: Manchester University Press, 2017), 23–36.

89 Figures from 2016 (when compared to previous census figures in 2011) indicate a 3 percent reduction in those identifying as Roman Catholic (now 78.3 percent of the population) and a 73.6 percent increase in those saying that they had no religious beliefs. See "Religion," in *Census of Population 2016*, Profile 8: Travellers, Ethnicity and Religion (Dublin: Central Statistics Office, 2017), 71–74, http://www.cso.ie/en/media/csoie/releasespublications/documents/population/2017/Chapter_8_Religion.pdf.

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teaching,[90] now church involvement in matters connected with social policy is regarded with suspicion and disapprobation or mockery.[91] This is not, of course, to say that aspects of Roman Catholic teaching do not continue to inform Irish *public* morality—still less that there are not many people in Ireland who remain devoutly Roman Catholic. But, critically, these teachings are now relevant to Irish public morality only because of their own, perceived, inherent moral value and not because of their source.[92] The old confessional public moral vision, on which, critically, the constitutional reference to blasphemy was grounded, has, therefore, been replaced by one that is secular and focused on individual rights and equality, and this has been reflected in government policy and legal developments.[93]

Why, then, did the Irish government in 2009 not simply hold a referendum to abolish the constitutional reference to blasphemy? The answer is financial. A referendum is an expensive thing to organize, and in 2009, Ireland was in the grip of a crippling economic recession. A referendum to remove a constitutional clause that was having no substantive negative impact was therefore seen as a waste of money[94]—indeed, as is noted above, nine years later, the referendum in relation to blasphemy was held on the same day as the presidential elections, and hence the expensive infrastructure connected with a popular vote was being engaged anyway. Thus, the then minister for justice, speaking in 2017, commented, "I decided that there was no way I was going to recommend to the Cabinet, in the economic climate that we had in 2009, when the Government were cutting people's wages, where people were losing their jobs . . . to have an expensive referendum solely on the issue of blasphemy. I'd be laughed out of court."[95]

What this means is that, whereas textually, opposition to blasphemy was an Irish constitutional value in 2009, equally the government and the Minister for Justice, did not believe that it was an element, let alone a *key* element of Irish public morality. Rather, its continued status in the

90 Thus, for example, in Ryan v. Attorney General [1965] IR 294 at 314, Judge Kenny in the High Court referred to Pope John XXIII's 1963 papal encyclical *Pacem in Terris* [Peace on Earth] in support of his conclusion that the Constitution included an unenumerated right to bodily integrity.

91 This manifested itself, in spring 2017, in widespread opposition (including from the Minister for Health) to the notion that the Sisters of Charity order might have some involvement in the governance of a new national maternity hospital to be built on its land. See, for example, "Poll Shows Overwhelming Opposition to Catholic Church Involvement in New Maternity Hospital," *Irish Examiner*, April 24, 2017, http://www.irishexaminer.com/breakingnews/ireland/poll-shows-overwhelming-opposition-to-catholic-church-involvement-in-new-maternity-hospital-786989.html; Michael O'Regan, "Harris Reiterates Maternity Hospital Will Be Independent," *Irish Times*, May 3, 2017, https://www.irishtimes.com/news/politics/oireachtas/harris-reiterates-maternity-hospital-will-be-independent-1.3070137.

92 At the time of writing, this logic is being applied in particular to the capacity of schools run by religious institutions to grant priority of admission to children who are members of the relevant religious faith. See Vivienne Clarke and Carl O'Brien, "School 'Baptism Barrier' is Unfair on Parents, Says Bruton," *Irish Times*, June 29, 2017, https://www.irishtimes.com/news/education/school-baptism-barrier-is-unfair-on-parents-says-bruton-1.3137790.

93 See Kathryn A. O'Brien, "Ireland's Secular Revolution: The Waning Influence of the Catholic Church and the Future of Ireland's Blasphemy Laws," *Connecticut Journal of International Law* 18, no. 1 (2002): 395–430.

94 In theory, the government might have followed the Law Reform Commission's advice and tacked a blasphemy referendum on to the "other" constitutional referendum on which the Irish people were asked to vote that year—a referendum seeking (for the second time) endorsement of the EU Lisbon Treaty. It would, however, have been strategically very unwise for the government to have linked that referendum (in the minds of those who *might* vote against it because of a concern with erosion of traditional and religious Irish values), with a referendum seeking to abolish the blasphemy clause. See Bruno Waterfield, "Vatican Issues Lisbon Treaty Warning to Irish Voters," *Telegraph*, October 1, 2009, http://www.telegraph.co.uk/news/worldnews/europe/ireland/6251741/Vatican-issues-Lisbon-Treaty-warning-to-Irish-voters.html.

95 See "We Believed That We Would Never See a Prosecution for It," *Broadsheet*, May 8, 2017, http://www.broadsheet.ie/2017/05/08/we-believed-that-we-would-never-see-a-prosecution-for-it/.

constitution was due exclusively to the fact that it was regarded as too expensive to remove it. It is a classic example of a blasphemy law that was not grounded in public morality.

This is, however, why the Irish experience is so pertinent for the purposes of this article. In 2009, the government faced a Hobbesian choice. On the one hand, it appeared to be constitutionally necessary to make provision for blasphemy within the new Defamation Act—in that an act from 1961 that it was replacing had done so. On the other, however, it was self-evident that such a step was profoundly out of line with contemporary Irish values. The compromise the government adopted was to act in accordance with constitutional obligations and flesh out the meaning of the crime of blasphemy, but in doing so, to render the crime effectively unenforceable in practice.[96] Thus, section 36 of the 2009 Act provided that

(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.[97]

On the face of it, it is hard to see how any prosecution could be successful under this section. After all, what is necessary is for someone to publish grossly abusive material about a religion, intending to and in fact causing outrage among a *substantial* number of adherents, where there is no redeeming value—literary, artistic, political, scientific, or academic—in the publication. It is hugely difficult to think of any remotely *valuable* speech that might fall into this category—and controversial "blasphemous" publications ranging from *The Satanic Verses* (literary value) to *The Life of Brian* (artistic value) to the Danish or *Charlie Hebdo* cartoons of the Prophet Mohammad (political value) would not. In other words, this was about as non-invasive a blasphemy law as one could imagine. Indeed, in July 2017, a report from the US Commission on International Religious Freedom concluded that Ireland had the least restrictive blasphemy law in the world.[98] Finally, and following the removal of the constitutional reference to blasphemy

96 See Ryan Nugent, "We Made Blasphemy Law 'Almost Impossible to Prosecute'—Former Minister Says about Stephen Fry Garda Investigation," *Irish Independent*, May 8, 2017, http://www.independent.ie/irish-news/we-made-blasphemy-law-almost-impossible-to-prosecute-former-minister-says-about-stephen-fry-garda-investigation-35690071.html. It can of course, be argued that the creation of an unenforceable blasphemy law honors the constitution no more effectively than if no such law was enacted.

97 Defamation Act 2009, § 36.

98 See Joelle Fiss and Jocelyn Getgen Kestenbaum, *Respecting Rights? Measuring the World's Blasphemy Laws*, United States Commission on International Religious Freedom, July 2017, https://www.uscirf.gov/sites/default/files/Blasphemy%20Laws%20Report.pdf.

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(and thus the constitutional obligation that blasphemy be a crime), the statutory crime in section 36 of the Defamation Act was removed by legislation in late 2019.[99]

Despite its leniency, enactment of the 2009 law led to an overwhelming public reaction of embarrassed horror.[100] A similar reaction emerged in late spring of 2017, when news broke in the Irish media that the well-known broadcaster and comedian Stephen Fry might be under police investigation for having committed blasphemy in the course of a program broadcast on Irish national television more than two years previously.[101] There was no substance to the (overblown) concerns; within days, the police confirmed that there was no evidence that any crime had been committed and hence the matter would be dropped.[102] Nonetheless, the response to the situation was generally one of mortification.[103] The argument was repeatedly made that Irish blasphemy law represented an unacceptable, anachronistic, and embarrassing interference with the right to free speech.[104]

I suggest that the explanation for this public reaction to such a substantively inconsequential law relates back to the purpose and nature of a blasphemy law.[105] Such a law (as distinct from a law that targets blasphemous speech because it generates other consequences—for example to protect minorities, prevent incitement to hatred, or even protect public order) carries an unequivocal message that the speech in question is so morally unacceptable that it should, properly, be regarded as unsayable. In 1937, it might well have been the case that Irish public morality endorsed such a proposition, but the seismic changes in Irish public life in the two decades prior to enactment of the 2009 Act meant that this was no longer the case. Thus the enactment of the "new law" appeared to represent a profound, if implied, mischaracterization of the nature of contemporary Irish public morality. This was especially poignant because many supporters of the new public morality of liberal secularism did not merely regard this vision as *preferable* to that of Roman Catholic confessionalism, rather they saw the latter as a fundamentally morally flawed anachronism[106] and the Irish changing of the guard as a progressive evolution. In other words, the 2009

99 Blasphemy (Abolition of Offences and Related Matters) Act, 2019 (Act No. 43/2019).

100 See Padraig Reidy, "Who asked for Ireland's Blasphemy Law?," *Guardian*, July 9, 2009, https://www.theguardian.com/commentisfree/libertycentral/2009/jul/09/ireland-blasphemy-laws.

101 Cathal McMahon, "Gardaí Launch Blasphemy Probe into Stephen Fry Comments on 'The Meaning of Life,'" *Irish Independent*, May 6, 2017, http://www.independent.ie/irish-news/news/garda-launch-blasphemy-probe-into-stephen-fry-comments-on-the-meaning-of-life-35684262.html.

102 Cathal McMahon, "Stephen Fry Blasphemy Probe Dropped after Gardaí Fail to Find a 'Substantial Number of Outraged People,'" *Irish Independent*, May 8, 2017, http://www.independent.ie/irish-news/stephen-fry-blasphemy-probe-dropped-after-garda-fail-to-find-substantial-number-of-outraged-people-35692915.html; see "No Blasphemy Investigation into Stephen Fry's Comments," *Raidió Teilifís Éireann*, May 9, 2017, https://www.rte.ie/entertainment/2017/0508/873567-no-blasphemy-investigation-into-stephen-frys-comments/.

103 Conor Pope, "Referendum on Blasphemy Being Prepared as Complaint Made against Stephen Fry," *Irish Times*, May 8, 2017, https://www.irishtimes.com/news/ireland/irish-news/referendum-on-blasphemy-being-prepared-as-complaint-made-against-stephen-fry-1.3074334.

104 Patsy McGarry, "End Blasphemy Laws Campaign Launched by International Coalition," *Irish Times*, January 30, 2015, https://www.irishtimes.com/news/social-affairs/religion-and-beliefs/end-blasphemy-laws-campaign-launched-by-international-coalition-1.2085483. See also Venice Commission, *Blasphemy, Insult and Hatred: Finding Answers in a Democratic Society* (Strasbourg: Council of Europe, 2010), http://www.venice.coe.int/webforms/documents/?pdf=CDL-STD(2010)047-e.

105 Generally, see Clive Unsworth, "Blasphemy, Cultural Divergence and Legal Relativism," *Modern Law Review* 58, no. 5 (1995): 658–77.

106 See Nick Bramhill, "Byrne Describes Catholic Church as "'Force for Evil'" *Irish Times,* March 31, 2013, https://www.irishtimes.com/news/byrne-describes-catholic-church-as-force-for-evil-1.1344551.

blasphemy law, far from eliding with Ireland's public morality (as was necessarily implied from the fact of its existence) was actually repugnant to it.[107] The fact that the 2018 referendum to abolish the constitutional reference to blasphemy passed so easily and without any real efforts on the part of the government to persuade people that the issue was important is testament to this fact.

Because the Irish law was not, in fact, grounded in public morality (and was so inconsequential in substance that it could not actually protect public order or the rights of others), I believe that it cannot be seen as having served a legitimate purpose insofar as international human rights law is concerned.[108] On the other hand, its importance for present purposes is that it indicates quite clearly that the criminalization of blasphemy per se does not invariably result in a law that is draconian or that entails abuses of the right to fair procedures. It is, in other words, perfectly possible to criminalize blasphemy in a manner that is also proportionate. Indeed, had there been any sense that contemporary Irish public morality objected to the morally inappropriate treatment of the sacred, there could be no question but that this law was a proportionate response to that concern.

Pakistan: A Draconian, Abusive Law Grounded in Public Morality

By contrast, it would be difficult to argue against a claim that the "unsayability" of blasphemy is an element of Pakistan's public morality. The 1973 Constitution of Pakistan clearly defers to Islam and to sharia, and indeed in 1980, General Zia had created a federal shariat court for the purposes of ensuring that laws were sharia-compliant.[109] On the other hand, unlike its Irish counterpart, the Pakistani law is draconian, rigorously and unequally enforced, and associated with very significant procedural abuses. It is, however, these facts that are the reason this law represents such a violation of human rights—not the fact that what it targets is the expression of blasphemy.

There are multiple examples of such abuses connected with the prosecution of blasphemy in Pakistan.[110] The law itself is something of a postcolonial hangover (albeit that General Zia added to it in the 1980s) and targets a number of different kinds of potential blasphemies, including defiling the Prophet, or the Qur'an, use of derogatory terms in relation to sacred persons, and deliberately and maliciously insulting or outraging religious feelings.[111] For particular forms of blasphemy (defaming the Prophet Mohammad), there is a mandatory death penalty,[112] and whereas this has not been enforced, this owes much to the fact that, in practice, its *legal* enforcement is

107 See for example Anna O'Donoghue, "Hozier Says He's 'Mortified' over Stephen Fry Blasphemy Probe," *Irish Examiner*, May 8, 2017, http://www.irishexaminer.com/breakingnews/entertainment/hozier-says-hes-mortified-over-stephen-fry-blasphemy-probe-788794.html. Very significantly, the singer's comments were made *after* the blasphemy investigation was concluded.

108 For the alternative viewpoint, see Temperman, "Blasphemy, Defamation of Religions and Human Rights Law."

109 Clark B. Lombardi, "Designing Islamic Constitutions: Past Trends and Options for a Democratic Future," *International Journal of Constitutional Law* 11, no. 3 (2013): 615–45, 632.

110 See Brian J. Grim, "Laws Penalizing Blasphemy, Apostasy and Defamation of Religion are Widespread," Pew Research Center, November 21, 2012, http://www.pewforum.org/2012/11/21/laws-penalizing-blasphemy-apostasy-and-defamation-of-religion-are-widespread/.

111 See generally Pakistan Penal Code §§ 295, 298.

112 This order was reaffirmed by the Federal Shariat Court in December 2013 (see also Muhammad Ismail Qureshi v. The Islamic Republic of Pakistan, Shariat Petition No.6/L of 1987 (1990)) and would now appear to be the law. See "Death Penalty Order Deepens Hard-line Islamist Trend in Pakistan, Critics Say," *Morning Star News*, December 30, 2013, http://morningstarnews.org/2013/12/death-penalty-order-deepens-hard-line-islamist-trend-in-pakistan-critics-say/.

https://doi.org/10.1017/jlr.2020.11 Published online by Cambridge University Press

replaced by mob violence and, where it *is* legally enforced this will often involve a wanton disregard for fair procedures.[113]

People can be arrested, tried, and detained on the basis of no evidence other than the malicious assertion of neighbors that they heard the person commit blasphemy.[114] Prisoners accused of blasphemy are attacked and on occasion have been killed by police.[115] The fact that an accused person might have very serious mental health problems is apparently irrelevant insofar as his or her prosecution is concerned.[116] The law is notoriously used to target religious minorities—in particular the Ahmadi community,[117] which was declared non-Muslim in 1973. It can be enormously difficult to find a lawyer brave enough to act for the defendant. Judges, who are themselves intimidated, are often patently biased in the matter—knowing that returning a conviction will work in their own interests whereas an acquittal might lead to them being attacked.[118]

These abuses are the reason Pakistan's blasphemy law cannot be seen as human-rights compliant. First, and although this reveals a secular bias, it is highly unlikely that any international human rights tribunal would accept that imposing the death penalty for blasphemy could be regarded as "necessary" to protect the aspect of public morals at stake.[119] Secondly, the international bill of rights protects more than merely freedom of expression, and the operation of Pakistan's blasphemy law generates abuses of the right to due process, religious freedom, and fair procedures that could not possibly be justified by reference to the nation's public morality.[120]

It is nonsense, however, to suggest that what is outrageous about these cases is that they involve prosecutions for blasphemy *simpliciter*. If Pakistan operated its laws against, let us say larceny, in this way, it would be equally unacceptable. Critically, moreover, if this *were* the case, this would not lead logically to a conclusion that larceny laws are universally bad things—rather, it must be accepted that what is bad are the abuses connected with the operation of the law. That being the case, it is difficult to see why the human rights abuses connected with Pakistan's *blasphemy* laws could be seen as any kind of argument in favor of the abolition of blasphemy laws generally. In other words, it is perfectly valid to conclude that Pakistan's blasphemy law is not human-rights compliant, but there is no logic

113 Alexander Smith, "Pakistani Christians Burned Alive Were Attacked by 1,200 People," *NBC News*, November 7, 2014, http://www.nbcnews.com/news/world/pakistani-christians-burned-alive-were-attacked-1-200-people-kin-n243386.

114 Samira Shackle, "The Lahore Court's Decision to Uphold Asia Bibi's Death Penalty Is Far From Just," *Guardian*, October 18, 2014; "Pakistan Court Upholds Asia Bibi Death Sentence," *BBC*, October 16, 2014, http://www.bbc.com/news/world-asia-29640245. See generally Asia Bibi and Anne-Isabelle Tollet, *Blasphemy: The True, Heartbreaking Story of the Woman Sentenced to Death over a Cup of Water* (London: Virago Press, 2012), and, in relation to the eventual acquittal of Asia Bibi, "Asia Bibi Blasphemy Acquittal Upheld by Pakistani Court," *BBC*, January 29, 2019, https://www.bbc.com/news/world-asia-47040847.

115 Mubasher Bukhari, "Pakistani Police Officer Axes Man to Death over Blasphemy," *Reuters*, November 6, 2014, http://www.reuters.com/article/2014/11/06/us-pakistan-blasphemy-idUSKBN0IQ15220141106.

116 See "Family Pleads for Muhammad Ashgar, Briton on Blasphemy Charge in Pakistan," *Guardian*, September 25, 2014, https://www.theguardian.com/uk-news/2014/sep/26/family-pleads-mohammad-asghar-briton-blasphemy-charge-pakistan.

117 Thus § 298B and § 298C of Pakistan's penal code (adopted in 1984) deal specifically with misuse of terms by members of the Ahmadi community.

118 See also Asad Hashim, "Living in Fear under Pakistan's Blasphemy Law," *Al Jazeera*, May 17, 2014, http://www.aljazeera.com/indepth/features/2014/05/living-fear-under-pakistan-blasphemy-law-20145179369144891.html.

119 See ICCPR, Article 6(2).

120 See, generally, American Association for the International Commission of Jurists, *Siracusa Principles: On the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (Geneva: American Association for the International Commission of Jurists, 1985), https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf.

https://doi.org/10.1017/jlr.2020.11 Published online by Cambridge University Press

to the argument that the illegitimate nature of Pakistan's law means that *all* blasphemy laws, including laws that uphold due process and that do not reveal the abuses connected with Pakistan's law, are also illegitimate. Once again, such abuses do not flow inexorably from the existence or operation of a blasphemy law per se—the Irish law was testament to this fact.

In fact, here the polar-opposite nature of the Irish and Pakistani laws becomes especially important. The Irish law was lenient, applied equally, and was protective of rights to due process but was not grounded in contemporary public morality. Pakistan's law *is* grounded in public morality, but it is draconian, provides for arguably disproportionate penalties, and operates without regard for due process. I have concluded that for these different reasons neither law should be seen as compliant with international human rights law. On the other hand, it is difficult to see why a law that was as grounded in public morality as Pakistan's law and as non-draconian and procedurally nonproblematic as the Irish law could not, as was suggested in General Comment No. 34, be justified pursuant to Article 19(3) of the ICCPR.

It will be rightly noted that, in practice, there are no blasphemy laws that are, simultaneously, as vehemently demanded by public morality as that in Pakistan and as ineffectual as that in Ireland. My point, however, is not that it is only a law of this kind that could be human-rights compliant. Rather, I am saying that, because such a law *would* be human-rights compliant, this means that the conclusion in General Comment No. 34 that blasphemy laws are *inherently* repugnant to international human rights law must be wrong. The question of whether laws that might be less grounded in public morality than that in Pakistan or more hard-hitting than that in Ireland are acceptable from an Article 19 standpoint can be answered only by a case-by-case assessment of whether such laws represent proportionate interferences with rights having regard to the demands of public morality.

This conclusion is, moreover, obvious and inescapable. Indeed, it is so obvious and so inescapable that it raises significant questions about the approach of the UNHRC and other equivalent entities within the international human rights movement toward blasphemy laws specifically and toward the relationship between rights and religion more generally.[121] It is to these questions that I now turn.

CONCLUSION: BLASPHEMY LAWS, HUMAN RIGHTS, AND THE CLAIM TO UNIVERSALITY

What is striking about the conclusion in General Comment 34 that blasphemy laws *inherently* violate the international right to freedom of expression, is that they provide absolutely no explanation as to *why* this should be the case. Instead (as is the tendency of General Comments of the UNHRC), they simply announce the fact as if it were a self-evident, universal truth.

121 In its submission to the Constitutional Convention in 2013, *Atheist Ireland* quoted Heiner Bielefeld, United Nations Special Rapporteur on Freedom of Religion, who said, "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 nonbelievers. 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." Athiest Ireland, "Athiest Ireland Asks Constitutional Convention to Remove Blasphemy Offence," September 19, 2013, https://atheist.ie/2013/07/atheist-ireland-asks-constitutional-convention-to-remove-blasphemy-offence/. Generally, see Bielefeld, Ghanea, and Wiener, *Freedom of Religion or Belief*.

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As I have shown, however, there is nothing remotely self-evident about this proposition. Rather, it butts up against two facts: (1) a blasphemy law can be a response to a public morality trigger and the international rights documents list the protection of public morals as a legitimate purpose for restricting freedom of expression; and (2) it is not the case that a blasphemy law will *inevitably* be draconian and abusive and thus that it *might* represent a proportionate reaction to a pressing social need. This is something with which opponents of the *concept* of blasphemy laws (rather than of particular blasphemy laws) never adequately engage. Indeed, as is discussed earlier, perhaps the most striking thing about both General Comment No. 34 (and the Rabat Plan of Action) is that, whereas they deem blasphemy laws to be in violation of the ICCPR unless they are covered by Article 20(2) of the ICCPR, they simply do not mention the fact that Article 19(3) expressly permits freedom of expression to be restricted in the name of public morals let alone consider the significance of this fact.

No doubt, blasphemy laws do not sit easily with a secular public moral vision.[122] But the reality is that for millions of people (and dozens of countries), religion, and religious devotion is at the heart of their moral compass.[123] Insofar as the public moralities of these countries is concerned, unacceptable irreverence (blasphemy) may be as morally unsayable as hate speech[124] or the "n-word" is in Western Europe or as Holocaust denial is in Germany.[125] De facto then, in these countries, blasphemous speech *does* offend, in a unique way, against public morality.

As I have pointed out repeatedly, this article is not, in any sense, an argument in favor of blasphemy laws or laws that, in any other sense, restrict freedom of speech, nor yet an argument that any particular such law is human-rights compliant. Such laws (like that in Pakistan) may involve procedural abuses, or, because of the way in which they operate, they may unjustly interfere with the rights to religious freedom of other people—in the sense of being unnecessary or disproportionate in their impact. This is also true of laws that prohibit apostasy (and arguably proselytizing) or punish members of religious minorities for exercising their religion (including, I would suggest, many European laws that prohibit the wearing of Islamic face veils). Moreover, this is quite apart from the overarching concern that blasphemy laws *always* interfere with freedom of expression—whether in a justified way or not. I am merely pointing out that there is no basis for ruling out the possibility that *a* blasphemy law *might* be justifiable.

It is, moreover, notable that bodies like the UNHRC do not have an equivalent difficulty with Holocaust denial laws, hate speech laws, or other laws in secular states that seek to curtail the expression of speech that is the secular "morally unsayable" equivalent of blasphemy. In other words, there is a strong implication that the concern of the UNHRC is not with the notion of a *secular* public morality trumping individual rights per se, but rather with the notion of a *non-secular* public morality being allowed to do so. Such an approach proceeds from a failure to accept

122 See Malcolm D. Evans, "From Cartoons to Crucifixes: Current Controversies Concerning the Freedom of Religion and the Freedom of Expression before the European Court of Human Rights," *Journal of Law and Religion* 26, no. 1 (2010): 345–70.

123 It is notable, after all, that 64 of the 193 states that are members of the United Nations have religious symbols as part of their national flags. Twenty-one of these states have signs associated with Islam. See Tim Marshall, *Worth Dying For: The Power and Politics of Flags* (London: Elliott & Thompson, 2017), 134.

124 On the connection between the underlying motivations of blasphemy and hate speech laws, see Justin Kirk Houser, "Is Hate Speech Becoming the New Blasphemy? Lessons from an American Constitutional Dialectic," *Penn State Law Review* 114, no. 2 (2009): 571–619, at 571. See also John C. Knechtle, "Blasphemy, Defamation of Religion and Religious Hate Speech: Is There a Difference that Makes a Difference?," in Temperman and Koltay, *Blasphemy and Freedom of Expression*, 194–222.

125 Cox, "Blasphemy, Holocaust Denial and the Control of Profoundly Unacceptable Speech," 739.

the undoubted reality that public morality is a relativist thing and that different countries will find their "truth" in different sources. It is, in other words, a case of the secularist mind-set reinforcing its own supremacy by ruling, objectively, against the moral legitimacy of a religious competitor.

The point is, once again, worth making that the universal truth of a nation's public morality (which will inevitably be affected by the history, culture, and nature of that nation) will, inevitably be empirically "unprovable."[126] No doubt there will be *some* "moral visions"—that of Hitler, for example—that might be universally condemned, but this is very different to a situation where supporters of one popular worldview (secularism) denounce the moral foundations of another popular world view (the religious one) as being demonstrably wrong or universally morally unacceptable. The fact that, in General Comment No. 22 (and, by extension, General Comment No. 34), the UNHRC appeared to do just this is hugely problematic and not least because it leaves international human rights law and the machinery responsible for its construction and enforcement open to the charge that it is not *genuinely* international in nature and, in fact, reflects deep cultural biases.

It is difficult to escape the factual reality that the text of the Universal Declaration of Human Rights[127] (constructed at a time when colonialism was still a reality), which informed the construction of the entire international bill of rights, had a strong Western and secular slant.[128] After all, the document stresses that, as a matter of universal truth, human rights are sourced in the concept of humanity—which necessarily had and will have a disenfranchising impact on those individuals and especially those states that believe that rights, like all morality, are sourced in God.[129] This is a problem, however, if the Universal Declaration of Human Rights (for example) is genuinely to be seen as universal or international and not least because of the sheer scale of the numbers of people who do not endorse the secularist vision on which it is based.[130] In other words, to the extent (if any) that, for example, the entire Islamic world is, even putatively, disenfranchised by the Western, secular leanings of the *text* of the international bill of rights, then this must, by definition, undermine the claim that it has *universal* legitimacy or is genuinely international.[131]

There is, however, a bigger problem than the "non-international" nature of the *texts* of human rights documents: namely the manner in which bodies like the UNHRC interpret them.[132] The blasphemy issue is a stark example of this in practice. After all, the twin conclusions that blasphemy laws are inherently inconsistent with the right to free speech and that public morality cannot be based on a single religious tradition are not warranted, let alone demanded by the text of the ICCPR. Furthermore, these conclusions necessarily have an impact not on secular states, but rather on those states whose public morality *is* drawn from a religious tradition and which *do* retain

126 Neville Cox, "The Clash of Unprovable Universalisms—International Human Rights and Islamic Law," *Oxford Journal of Law and Religion* 2, no. 2 (2013): 307–29.

127 UN General Assembly, Universal Declaration of Human Rights, 217 [III] A (1948).

128 See Baderin Mashood, "A Macroscopic Analysis of the Practice of Muslim State Parties to International Human Rights Treaties: Conflict or Congruence?," *Human Rights Law Review* 1, no. 2 (2001): 265–303, at 266.

129 The strong Western, secular leanings of the text of the Universal Declaration of Human Rights are demonstrated in a comparison between it and the 1991 Cairo Declaration of Human Rights in Islam, which, obviously, has a clear religious focus. Organization of the Islamic Conference, Cairo Declaration on Human Rights in Islam (August 5, 1990), http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/FMRpdfs/Human-Rights/cairo.pdf. For analysis, see Anne Elizabeth Mayer, "Universal Versus Islamic Human Rights: A Clash of Cultures or Clash with a Construct," *Michigan Journal of International Law* 15, no. 2 (1994): 307–404.

130 To take the most obvious clash, the Organisation of Islamic Cooperation, the body that sponsored the various Defamation of Religion resolutions passed by the United Nations between 1999 and 2011 has fifty-seven member states and thus, theoretically, represents nearly a quarter of the world's population.

131 Cox, "The Freedom to Publish 'Irreligious' Cartoons," 207.

132 Generally see Baderin, "A Macroscopic Analysis of the Practice of Muslim State Parties," 266.

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blasphemy laws predicated on such a (religious) public morality. The result is a situation where, without any textual justification, the very broad terms of the International Bill of Rights are interpreted in line with the contemporary ideology of Western, secularized countries, with the international rights movement claiming that this interpretation also has universal moral legitimacy.

It is one thing for an individual opponent of blasphemy laws to treat people with heightened religious sensitivities contemptuously; it is quite another for the UNHRC, without any textual support for its conclusion, to tell states that their vision of the relative importance of free speech and reverence for God is *universally* wrong. Statements of this kind clearly imply that the Western secular worldview is also the universal yardstick by which international rights are to be interpreted and the legitimacy even of the law of God is to be measured. That being the case, they will inevitably lead to frustration on the part of non-secular, non-Western countries with the whole rights project and a resentment that what was supposed to be a *magna carta* for humankind,[133] has become a tool for moral imperialism by a secular elite and is international in nothing more than name and claim.

For many people and indeed many secularized states, the concept of a blasphemy law in the twenty-first century represents something of an anachronism. More pertinently, and particularly for European countries with a history of religious oppression, such a law harkens back to a time when individual rights were restricted in the name of religious tyranny. *International* human rights, on the other hand, if they are to merit that description must be genuinely international in nature and an interpretation of such rights that fails to respect this fact must be suspect. Under the terms of documents like the ICCPR and the European Convention on Human Rights, it is clear that rights to freedom of expression may be limited in the name of public morality, and unless and until it can be demonstrated that a religiously based public morality is objectively impermissible, there are simply no grounds for deeming it not to count in this way. The conclusions reached by the UNHRC in General Comments 22 and 34 are therefore deeply problematic. At best, they represent a failure to deal with the complexities posed by the terms of the ICCPR. At worst, they smack of an elitist, secular takeover of rights language—one that threatens the supposedly international nature of what is at stake and, in doing so, has the capacity to undermine the entire rights project.

ACKNOWLEDGMENTS

I am grateful to Professor David Kenny of Trinity College Dublin and the anonymous reviewers of this article for their very helpful comments.

133 This was the term coined by Eleanor Roosevelt in relation to the Universal Declaration of Human Rights. For a superb account of the work of the first Human Rights Commission, see Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2002), 173.