Religious Offences and Liberal Politics: 
From the Religious Settlements to Multi-Cultural Society

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Introduction
In this paper I will argue that some of the key features associated with modern liberal political orders — particularly in the areas of religious toleration and cultural pluralism — are the result of specific political and legal arrangements arrived at by European states in order to contain religious civil war at the end of the seventeenth century. As such, liberal political and legal regimes contain features which are irreducible to their main modern forms of philosophical justification, some indeed which conflict with such justifications. One can of course respond to this state of affairs by declaring the actual historical arrangements to be merely factual or “non-ideal” in relation to the normative or ideal domain of political or moral philosophy. To do this, however, is to risk overlooking the normative dimensions of the historical arrangements themselves — in this case the early modern religious settlements. But it is also to risk a kind of philosopher’s self-delusion, in which it is imagined that political norms arrived at through rational introspection have an intrinsic moral force, regardless of their capacity to engage the historical political-legal order and the personae engaged in its day-to-day operations. This paper explores the contrary course. It offers a sketch of the political and legal order established by some of the early modern religious settlements, and then argues its salience for understanding the character of multi-religious and multi-cultural governance in certain modern liberal states, with particular reference to such religious offences as sacrilege and blasphemy.
The post-Kantian political philosophies developed by John Rawls and Jürgen Habermas can be cited in passing as prime examples of modern philosophies that fail to engage the political and legal orders arising from the early modern settlements, except to declare them in need of philosophical reconstruction or historical supercession. Rawls and Habermas are not topics of discussion in the present paper, and they are mentioned here only to illustrate the gap between modern justifications for liberal-democratic politics and the forms in which liberal political orders first emerged from the settlements that brought an end to religious civil war at the end of the seventeenth century. Despite important differences in method, Rawls and Habermas both assume that the heart of liberalism lies in justice, understood in terms of principles of political and social rights grounded in the rational consent of democratic citizens. On this view, the political and legal arrangements imposed by early liberal orders — toleration measures, church-state separation — will not be properly legitimate until they have been freely chosen by rational individuals who will see them as necessary for their own exercise of reason (Forst 2003). Yet, as Raymond Geuss has pointed out, the central norm of much early modern political thought was not justice but security or social peace (Geuss 2002). Further, many early architects of religious toleration regarded the notion of a single universal reason not as the foundation but as a threat to the cultural pluralism required for toleration, which they sought to ground in a suitably de-confessionalised political and legal regime, regardless of whether this was democratic (Hunter 2004; Thomasius 2004).

If modern philosophical liberalism is significantly disengaged from the historical architecture of toleration and pluralism, however, then its communitarian critics are even more so. This is because they take Rawls at his word and assume that he is indeed the philosophical architect of the liberal political order, so that in attacking his philosophical discourse they are attacking something called liberalism. Catholic and Communitarian philosophers have thus taken it on themselves to attack something called liberal individualism, by treating this as the unfortunate product of the fracturing of communal moral identity during the Reformation (MacIntyre 1981). They have also criticised the supposed rational neutrality of the liberal conception of justice, in particular its attempt to ground religious freedom in the exercise of free rational choice, rather than in the right to pursue a substantive good characteristic of a group moral identity (Sandel 1998; Galeotti
And finally they have attacked the presumed neutrality of key aspects of the liberal order itself, specifically the separation of church and state, arguing that this is simply a disguised moral commitment, similar to the commitment to theocracy, and that only full democracy can resolve the question of which commitment should determine the political order (Bader 1999). If, however, the emergent liberal order was not grounded in a conception of justice — Kantian or Aristotelian — then much of the communitarian critique of liberalism is beside the point, regardless of its standing as a critique of Rawls. Further, if security and social peace did indeed play a key role in motivating and justifying liberal arrangements for toleration and the separation of church and state, then it is idle to attack early liberalism for lacking substantive norms, even if these norms are not those of a moral community, are quite unlike Aristotelian conceptions of an inherent moral telos, and could not possibly have been arrived at through democratic deliberation.

The reason that early liberalism looks so unlike that which Rawls defends and the communitarians attack is that it was not based in a set of arguments about the nature of human reason and morality. Rather, it was based in a set of political and legal measures designed to address a particular historical situation characteristic of central and western European states during the sixteenth and seventeenth century. This situation was that of religious civil war in France and England, and, in the German Empire, a mix of two kinds of religious war, civil and inter-state. In what follows, it is argued that the key elements of early liberalism — varying degrees of toleration and church-state separation — formed part of the religious settlements that brought these wars to an end, a symptom of which was the increasing redundancy of such religious crimes as heresy, witchcraft and blasphemy. These settlements, it is argued, laid down the central cultural, political and legal protocols for the liberal governance of multi-religious societies. And if we are to understand the role of these protocols in the governance of emerging multi-cultural societies, then we must attend to their historical gravity and force, rather than to their philosophical defence or critique. To do this, I will begin by briefly looking at the context in which religious offences operated in pre-liberal confessional states, then sketch the manner in which such offences were displaced by the terms of the religious settlements, before concluding by looking at recent discussion of the crime of blasphemy in the context of multi-cultural societies.
**Religious Offences and the Sacral State**

Throughout the medieval and early modern period, European Christianity was more than just a spiritual locus. It was a formidable earthly force. It exercised direct political and juridical power through an archipelago of armed prince-bishops, the diocesan structure being in fact the footprints left by Christian warriors as they made their way across Europe, stamping out ‘paganism’ in the early middle ages (Bartlett 1993: 5-23). And it exercised indirect power through secular princes, who enforced the law of the most powerful prince-bishop — the bishop of Rome — as part of their exercise of lordship (Padoa-Schioppa 1997). Under these circumstances, where there was no clear distinction between the religious and political community or between the Christian and the citizen, religious offences were at once spiritual transgressions and a judicial felonies, attracting severe criminal punishment.

We can suggest, then, that such sacrilegious offences as heresy, witchcraft and blasphemy emerged as sins and crimes in Western Europe as the result of a particular set of cultural and political circumstances: broadly, those of a transcendent sacralising religion exercising overwhelming political and juridical powers, both through its own authority and that of the secular prince or emperor. There are two broad factors to take into account. In the first place, as the obverse of the sacred, sacrilege was a powerful and authentic expression of core Christian sacramental practices, finding expression in both popular devotion and elite theological speculation. A common focus was provided by those earthly things held to be bearers of the transcendent divinity — the church and within the church the Eucharistic host — which, as the most sacred and beneficial of things, were also the most vulnerable to profanation and degradation. Thus, in many parts of late-medieval Europe, as the magical source of God’s blessing on the community, the host was paraded through the village and fields in early spring to ensure a good harvest (Baur 1992). Concomitantly, the allegation of sacrilegious profanation of the host was the routine way of triggering murderous Christian pogroms against local Jewish communities, non-believers whose polluting proximity to the circle of communicants threatened communication with God (Nirenberg 1996).

Second, if sacrilege was deeply rooted in sacramental religious practice, then during the thirteenth and fourteenth centuries it underwent a major elaboration and
codification in canon law, where it was linked to heresy, blasphemy and witchcraft. This was the time at which the university canonists of Northern Italy developed a common legal process for dealing with this array of crimes; a process that could be initiated by denunciation, deployed oaths of veridiction, permitted the regulated use of torture to obtain evidence, denied appeal, and could result in the death sentence (Trusen 1992). The extension of canon and Roman law across Western Europe during this period resulted in a centralised system of legal authority, permitting the papacy to exert religious and civil jurisdiction via local clerical and secular authorities (Padoa-Schioppa 1997). Sacrilege thus came to be prosecuted in a much more systematic manner and, because of its linkage to heresy, blasphemy and witchcraft, participated in a cross-referring nexus of religious criminality. Heretics were thus routinely denounced as sacrilegious, their guilt being proved by the fact that they performed mock masses, feasted on Eucharistic wafers, broke crucifixes, declared Jesus to be a fraud, and so on. And those on trial for sacrilege were routinely denounced as heretics, their profane acts being indicative of their secret adherence to erroneous and ungodly beliefs.

The presence of sacrilegious religious offences in early modern Europe was thus symptomatic of a tightly woven and far-flung matrix of sacramental practices, juridical procedures, and authority structures, anchored ecclesiastically in the papacy and politically in the Holy Roman Empire. Despite the relative civil autonomy of the Northern Italian city states, elsewhere in Europe this matrix resulted in a virtual superimposition of the sacramental community on the civil community. Threats to the sacramental community resulting from sacrilege, heresy and blasphemy, once proved by the ecclesiastical courts, were subject to the harshest of punishments by the civil authorities. Conversely, threats to civil authority were themselves treated as analogous to sacrilege against the sacred person of the prince, who was God’s viceroy on earth (Kantorowicz 1957). It is this very superimposition of the sacramental and civil communities, however, that explains the intensity and uncontrollability of the religious-political conflicts that followed from the splitting of the church at the beginning of the 16th century. For once the heresy that would become the Protestant church had escaped the juridical and political machinery designed to contain such outbreaks, Protestant
princes immediately used this machinery to defend their religion against the Roman church and against rival Protestant churches and sects.

Given that faith communities were demarcated by the border between the sacred and the profane — between true believers and the heretical monsters — the civil conflicts that erupted across Europe assumed a specifically religious intensity, as those one sought to exterminate were not just political enemies but polluting threats to the sacramental community and its capacity to communicate with God (Crouzet 1990). Further, this sacramental violence was made all the more difficult to control by the fact that the new religion differed from the old both in its construction of the sacred and therefore in its sense of sacrilege. The Calvinists in particular stressed the transcendence and inscrutability of God, rejecting the notion of real presence in the Eucharist, and regarding other forms of Catholic immanentism — rituals, processions, pilgrimages, relics — as sacrilegious idolatry, making sacrilege itself into a flashpoint for sacramental violence. In June 1528, for example, the first act of Calvinist iconoclasm in Paris — the vandalising of an image of the Virgin — was answered by an act of Catholic ritual cleansing, as all parishes and the university organised processions to atone for this sacrilege (Ramsey 1999: 8). Ritual burnings, disembowelments, and massacres were soon to follow, as France descended in a series of religious civil wars in which both sides viewed the extermination of the other as necessary for cleansing a spiritual pollution and restoring the purity of the sacramental community.

At the same time, however, the very ferocity of this violence, which threatened the survival of the state itself, led Bodin and the politiques to make the first attempts to separate religious and political community, by developing a secular conception of sovereignty. We can see this in terms with which the Chancellor Michel de L’Hôpital addressed a peace colloquium during the first war of religion in 1562:

   It is not a question of establishing the faith, but of regulating the state. It is possible to be a citizen without being a Christian. You do not cease to be a subject of the King when you separate from the Church. We can live in peace with those who do not observe the same ceremonies. (L’Hôpital 1824-5: I, 425)
In fact Chancellor L’Hôpital’s words proved to be in vain in the French context, as France would eventually solve the problem of religious conflict by suppressing then eliminating the French Calvinists or Huguenots. Nonetheless, they pointed forward to a profound change — the uncoupling of political governance from Christianity spirituality — which would radically transform the character of the sacred and of sacrilege.

**The Spiritualising of Religion and the Desacralising of Law and Politics**

During the 17th century France, England, and the German Empire were all faced with the same set of problems: how to achieve religious peace and how to establish stable rule in territories containing bitterly divided religious communities. The measures that evolved to meet these problems — religious toleration being just the tip of the iceberg — would alter the disposition of the sacred and lead to the sidelining of sacrilege (together with heresy and, eventually, blasphemy) within an increasingly autonomous civil domain. Unfortunately for the historian, these developments differed significantly both within the German Empire and between England and France, so that there is no typical case. In order to keep my exposition manageable, I will thus focus on developments in the German states — Brandenburg-Prussia in particular — making do with just a few comparative remarks on England and France, acknowledging upfront the element of historical bias thus introduced.

The developments that saw the institution of religious peace within the German Empire were piecemeal, protracted, and never fully successful. Nonetheless, we can detect a pattern of development in the century that separated the Religious Peace of Augsburg of 1555 and the more permanent Peace of Westphalia in 1648. In bringing an end to the Thirty Years War, Westphalia declared that henceforth all three main confessions — Catholicism, Lutheranism and Calvinism — would be recognised and tolerated under imperial law, albeit within the limits of a complex set of arrangements intended to stabilise a particular distribution of religious communities both within and between states. In his account of this multiplex process, the German historian of church law, Martin Heckel, points to a number of key elements: the relegation of theology in favour of European public law as the key discourse in the peace negotiations; the gradual acceptance of the permanence of heresy by leading negotiators, even if the churches
would have none of this; and, most important of all, the dropping of religious truth as a criterion for peace in the great treaties, and its replacement by a quite different kind of norm for legitimacy: namely, the attainment of social peace (Heckel 1989; Heckel 1992). In making social peace the prime duty of the sovereign — as opposed to defending the faith or enforcing religious law as God’s earthly viceroy — these developments led to a profound secularisation of the political domain. Yet, as Heckel has argued, this was not a secularisation driven by some all-embracing secularist philosophy (in the manner of the French *philosophes*), but one carried forward by many anonymous jurists and statesmen who remained devoted Christians (Heckel 1984). Far from attempting to expunge Christianity, their prime objective was to secure the survival of their own confessions in the face of wholesale religious slaughter. Yet they gradually accepted that for this to happen it would be necessary to separate the church’s pursuit of salvation from the state’s aim of worldly security.

In the case of post-Westphalian Brandenburg-Prussia, this led to a profound dual transformation of the religious and political landscape. On the one hand, there was remarkable desacralisation of politics, as jurisconsults and political philosophers attached to the court began to reconstruct the objectives of the state in quasi-Hobbesian terms; that is, in terms of maintaining external and internal security while eschewing all higher-level religious and moral aims. On the other hand, there was a no less remarkable spiritualisation of religion, as the Pietists aided by important lay theologians attempted to undermine the whole idea of religious orthodoxy — that is, the idea that salvation was tied to a particular set of theological doctrines and sacramental practices — arguing instead that salvation came instead from a purely personal inner relation to God.

The manner in which this dual desacralisation of politics and spiritualisation of religion transformed the prior construction of sacrilege, heresy, and witchcraft can be seen in the writings of Christian Thomasius, professor of law at the University of Halle in the late 17th century, lay theologian, and jurisconsult to the Brandenburg-Prussian court. In his works attacking the legal prosecution of heresy, witchcraft and sacrilege, Thomasius argued along two convergent paths. First, in keeping with his Epicurean form of Protestantism, Thomasius attacked what he called the visible church, understood as a public institution whose doctrines and rituals are necessary for salvation, arguing instead
that the true church is invisible, known by no outward doctrinal or liturgical signs, with its members permanently scattered across the globe. This was in effect an attempt to detach salvation from the church, and it removed the theological grounds of heresy and sacrilege by (in effect) denying that God was mediated by specific sacred doctrines or by sacred rituals in holy places (Thomasius 1705). Second, in keeping with the quasi-Hobbesian conception of politics which he had learned from his mentor Samuel Pufendorf, Thomasius argued that the state had no religious objectives and must be restricted to the ends of maintaining domestic peace and external security (Thomasius 1701; Thomasius 1705). For this reason, there should be no laws against sacrilege, heresy and witchcraft as such, unless the actions associated with them gave rise to violence or civil disorder, in which case they would be punished for that reason, and not because they profaned the community of the faithful (Thomasius 1701).

Unlike his more famous contemporary John Locke, Thomasius did not base his arguments for toleration on the philosophical notion of natural rights, but on the dual imperatives to spiritualise religion and desacralise the state, whose overarching goal was not personal liberty but the stable governance of multi-confessional societies (Dreitzel 1997). More generally, we can say that Thomasius’s Epicurean Christianity and Hobbesian politics were held together not by a philosophical doctrine grounded in human reason, but by a cultural-political strategy designed to address a particular set of circumstances. We gain a good insight into the character of this strategy via the key use Thomasius makes of the category of *adiaphora* (Thomasius 1705). *Adiaphora* refers to things neither commanded nor forbidden by God, hence morally indifferent in the sense of being irrelevant to salvation. As the result of his highly personalist Epicurean style of Christianity, Thomasius declared virtually the entirety of the visible church — all of its liturgies, sacraments and theological doctrines — to be morally indifferent with regards to salvation. On the one hand, this meant that forms of worship were a matter of “Christian freedom”, to be left to the disposition of individuals or groups to the extent that they posed no threat to social peace. On the other hand, it also meant that should any form of worship pose a threat to public peace then, as something morally indifferent, it was legitimately subject to the civil sovereign, who had absolute authority over all matters capable of threatening public order. The object of this dual strategy was not to
defend individual freedom of conscience as such; rather, it was to deprive the churches of all civil and political authority, thereby removing the instruments of their mutual religious persecution, and establishing a de-confessionalised state as the means of maintaining a legally enforced toleration between the rival religious communities. In Brandenburg-Prussia, it was this dual strategy that led to the disappearance of such religious offences as heresy and witchcraft and the transformation of others, such as blasphemy, into public order offences no longer grounded in sacrilege.

Thomasius thus marks the moment at which, after a century-and-a-half of religious war, the web of canon laws which had tied the political to the religious community began to be unpicked, allowing the persona of the citizen to be differentiated from that of the Christian; although even in Western Europe this moment was neither epochal nor universal. In late seventeenth-century England, religious peace was achieved in a quite different way: not by dismantling the confessional state, but by rebuilding it in a more stable, less persecutory form. This was achieved in accordance with two broad strategies. First, the Anglican church that was to be established as the state religion was purged of enough Anglo-Catholic theology to bring back on board moderate Calvinists, providing a stable religious middle-ground. Second, using a combination of test acts and toleration acts, non-conforming Protestants and Catholics were excluded from office-holding in the Anglican state, while permitted freedom of private worship. While this set of strategies proved no less successful in securing religious peace than those used in Brandenburg-Prussia, its effect on the laws pertaining to heresy, witchcraft, sacrilege and blasphemy was far less dramatic and uniform. While heresy and witchcraft laws were repealed during the 18th century, blasphemy remained a common law crime as a means of protecting the state religion, leading it to form a new juridical series with sedition and obscenity. Nonetheless, here too blasphemy progressively lost its basis in sacrilege, gradually assuming the form of a public order offence, with the result that blasphemy prosecutions became increasingly rare.

**Blasphemy and Multi-Cultural Societies**

As a result of the broad developments just discussed, in those Western European-based jurisdictions where sacrilege and blasphemy laws remained on the books, they lost their
religious character. As these laws evolved in the nineteenth and twentieth century, it was no longer the violation of persons, things and places inhabited by a transcendent divinity that defined the crime, but something else altogether: the giving of offence in a manner that might lead to civil disorder or violence. This sea change allows what were formerly religious offences to be either abolished or, if harmful conduct remains, to be sanctioned by non-religious public order and anti-discrimination laws. This is the tendency that informs the 1985 report of the United Kingdom’s Law Commission, which recommends abolition of the common law offences of blasphemy and blasphemous libel on the grounds that they are archaic offences presenting unjustified infringements of the right to freedom of speech (Commission 1985). The same sense of historical development informs work of the New South Wales Law Reform Commission, in its Blasphemy Report of 1994. The Commissioners thus argue that the key element of the law — that of offensiveness likely to cause civil disturbance — obviates the need for a special law on blasphemy, as this element is well covered by other public-order and anti-discrimination laws (Commission 1994). I would suggest that this kind of recommendation is indicative not of a state of affairs in which society has lost touch with the sacred; rather, it is indicative of one in which the sacred exists only at the level of society — that is, at the level of voluntary religious associations — having been purged from the coercive apparatus of the state as a result of the early modern religious settlements. This would be in keeping with the fact that the last blasphemy prosecution launched in an Australian jurisdiction — namely the action initiated by George Pell, then Catholic Archbishop of Melbourne, against a photo-montage called *Piss Christ* — failed. This was in part because the Victorian Supreme Court was unsure whether there was a law against blasphemy in Victoria, and in part because even if there were, the montage was unlikely to cause public unrest (1998).

It would be a mistake, though, to think that the story ends here, or to assume that this line of development is irresistible and destined to be universal. That kind of assumption is suited to the view of a universal process of modernisation driven by the progressive realisation of humanity’s common capacity for rational self-governance. It is not suited to the account we have given, in which toleration and the separation of church and state represent a strategic response to a particular historical state of affairs, and which
depend upon something as fallible as the institutions of a deconfessionalised liberal state. We should not be surprised, then, or take it as sign of anachronism or irrationalism, if blasphemy has returned to the political agenda of a liberal state like the United Kingdom. One of the pointers to what is at stake in this return is provided by the last blasphemy prosecution launched in the United Kingdom. One of only a handful in the twentieth century, the case against Salman Rushdie for his *Satanic Verses* arose from the complaint of a Muslim man and took place in 1991, at a time when Rushdie was under threat of religious murder from the Islamic theocracy of Iran. If the circumstances of the prosecution point to a novel form of the problem of religious friction — that arising from the presence of non-Christian religious communities in Christian or post-Christian societies — then the resolution of the case points backwards, towards the specific character of the English religious settlement. The charge against Rushdie failed because, according to the common law of England, blasphemy may only be committed against the Church of England, whose political establishment reflects the character of the Anglican Settlement (1991).

If the Rushdie case was a pointer to the emergence of problems associated with the liberal government of a multi-religious and multi-cultural society, then the catastrophe of 11 September 2001 catapulted these problems to the forefront of political and legal discussion in a way that could scarcely have been imagined at the end of the twentieth century. Before that year was out, the British government had introduced the Anti-terrorism Crime Security Act which, in addition to new police and judicial powers to deal with the planning and execution of terrorist acts, had also proposed introducing a crime of incitement to religious hatred. This would have been an extension of the existing incitement to racial hatred statutes of the Public Order Act 1986 and was aimed at increasing the legal protection available to Britain’s Islamic community. Despite concerns about the extension of state power, this combination of increasing the state’s capacity to deal with external security, while protecting religious freedom as a means of forestalling domestic religious conflict, looks very much like the actions of a deconfessionalised liberal state. In the event, the incitement to religious hatred provisions of the anti-terrorism bill failed to pass through the House of Lords, apparently due to worries about freedom of speech. It was this that led Lord Avebury to table a Private
Member’s Bill proposing repeal of the existing common law offences of blasphemy and blasphemous libel, and the introduction of a new offence of incitement to religious hatred. And it was this bill that led to the appointment of a House of Lord’s Select Committee to inquire into these issues and, more broadly, into the utility of existing religious offences in England and Wales.

In briefly discussing the Committee’s report, which was published in April 2003, I will not attempt to do justice to its often fascinating detail, only to draw out what is significant in relation to our historical sketch of the early modern religious settlements. The first thing to note is that the Committee was unable to arrive at any positive recommendations. While recognising the need to offer increased protection to religious communities against vilification, abuse and violence, it was unable to agree on the means of doing so, failing to recommend either the abolition of the existing blasphemy laws, or the creation of a new offence of incitement to religious hatred (Committee 2003a: 38-9). There appear to be several reasons for the Committee’s inability to act, related both to the diversity of the submissions it received and, more significantly, to a lack of assurance or agreement with regards to the appropriate intellectual framework for arriving at judgments on the key issues.

First, with regards to the diversity of the submissions, it is noteworthy that the Islamic Society of Britain recommends retention of the blasphemy law and its extension to all religious communities, arguing primarily from the need to protect the Islamic community from “Islamophobia”, particularly that instigated by the British National Party (Committee 2003b). For its part, the Muslim Council for Religious and Racial Harmony argues the need to strengthen laws against incitement to religious hatred, but also against “sacrilege and abuse of religious sanctities”, citing as a prime example of “filth against Muslims” Rushdie’s *Satanic Verses*. The Board of Deputies of British Jews, however, is not unhappy with the existing law covering incitement to racial hatred — from which Judaism benefits as an ethnically based religion — and is more worried by the apparent failure of the Crown Prosecution Service to use the law, particularly against anti-Jewish attacks by Muslims. The Board is happy for the blasphemy law to remain in its current form, as protection of the Church of England, but would support an incitement to religious hatred statute in order to extend protection to the Islamic community. For
their part, the Anglican and Catholic churches agree that a law against incitement to religious hatred should be introduced and, were this to prove successful in protecting religious communities, then the blasphemy laws could be repealed. Given this diversity of advice, some of arising from religious communities in relations of actual or potential conflict, it is not surprising that the Committee could see no clear direction arising from the submissions it received.

Second, the Committee’s uncertainty is compounded by one of the central legal-intellectual frameworks that it feels compelled to use in its deliberations: namely, that provided by the European Convention on Human Rights. The Convention has not been directly accepted into English law but, since the Human Rights Act 1998, it is required that judicial bodies must interpret English law in a manner rendering it consistent with the Convention. The problem is that it is not readily apparent how England’s religious offences laws might be rendered consistent with the Convention. Article 9 of the Convention states in part that “Everyone has the right to freedom of thought, conscience and religion”; while Article 10 stipulates that “Everyone has the right to freedom of expression”; and Article 14 declares that “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status” (Council 1950). The Committee is well aware that were an appeal on a blasphemy case to find its way to Strasbourg then the existing common law, with its restriction of protection to the Church of England, would be radically incompatible with Article 14. Yet it can see no clear way to change the law, because of what it regards as an impossible balancing act imposed by the right to have one’s religion protected and the right to freedom of speech. Treating this as a quasi-philosophical problem, the Committee finds that it would be very difficult to draft laws against incitement to religious hatred that could discriminate between illegitimate incitement and the legitimate expression of hostility towards a religion (Committee 2003a: 26-7).

But this difficulty is surely a pointer to a more profound underlying problem, namely, the apparent incompatibility between the language of the Convention on Human Rights and the terms in which European political and legal orders have dealt with the
problems of religious conflict and religious freedom. The Convention uses the language of natural right — one might say the language of Locke and Rawls — in order to formulate fundamental rights to such things as freedom of religion and freedom of speech. And it leaves open the question of how these different rights are to be reconciled, and the extent to which they might be limited by security and public order provisos. If the history we have sketched is tenable, however, then freedom of religion arose not from natural rights but from the measures employed by liberal orders to deal with the problem of religious conflict. Toleration measures, for example, emerged as a means of escaping the conflict arising from state-sanctioned religious persecution, and involved either detaching churches from the institutions of judicial and political authority, or else restricting their capacity to use these in a persecutory manner. This was typically achieved by offering varying degrees of freedom of worship, not as an unfettered natural right, but to the degree required to preserve social peace. As the inheritors of these settlements, liberal political and legal orders are not involved in the game of balancing potentially conflicting fundamental rights, but in the quite different task of adjusting degrees of freedom (whether of speech or religion) in light of an assessment of the likely threats to personal and state security arising. The Committee is still in touch with this way of thinking, as we can see from the following comment, in which it acknowledges that its judgments must be informed by an assessment of the fluctuating level of religious tranquility:

We are a society in which no major religious group, including atheists, objects to the presence of others, and there is little friction between the leaders of various faiths. It is, however, important to recognise that continued tranquility depends not only upon continued mutual tolerance but, equally, on equality of protection from intolerance on the basis of religion or belief or no belief. So long as the major religious communities can pursue their ideas, their beliefs and their practices, and so long as none of these cause any undue impact upon the secular segment of society, or on each other, a form of stability can be achieved. But this cannot be taken for granted. (Committee 2003a: 7)
The difficulty is that there is no apparent way of reconciling this way of approaching the problem with the language of universal human rights. This gives rise to a remarkable state of affairs, in which the actual organisation of the liberal political and juridical order remains out of reach of a central mode of modern moral reflection.

Thirdly, and finally, this is a pointer to the fact that the Committee’s failure to arrive at any recommendations appears to reflect a fundamental ambivalence in its own thinking about the character of English religious offences. On the one hand, the Committee insists that religious offences date from a time in which it was held that religious belief was part an parcel of the social and political order, which could not survive if people were permitted to express contempt for religion or to violate its laws. Since those days are long passed, it is not at all clear that we need religious offences of any kind: “Some might regret that, but it does not alter the fact that the law is now concerned with the preservation of the peace of the realm, and the concern is not so much with views of the deity as with the satisfactory state of society” (Committee 2003a: 46). The Committee thus appears sympathetic to those submissions which argue that existing public-order offences, covering things like incitement to commit a crime, intimidation, assault, and damage to property, should be able to offer all of the protection that members of religious communities need, without having to make religious faith part of the definition of the crime. This, broadly, is the path taken by the UK Law Commission in 1985 and the New South Wales Law Reform Commission in 1997, when they recommended that the crime of blasphemy be abolished. Finally in this regard, the Committee comments that: “It must be appreciated that the definition [of blasphemy] has developed historically to meet various, primarily political rather than religious, perceptions of a need for the law to protect institutions, originally the State itself”; even if this fact is regretted by the Church of England and completely rejected by several Evangelical witnesses (Committee 2003a: 47).

On the other hand, however, elsewhere, the Committee seems far less sure that the day of religious offences has passed. In discussing India’s laws against religious vilification, for example, the Committee comments that, “The rationale underlying the Indian laws was neither antipathy to freedom of speech as such nor the protection of public freedom, but the maintenance of public peace and tranquility in a country where
religious passions were considered to be easily aroused and inflamed”. Yet, despite its own acknowledgement of the contingent character of English religious tranquility, the Committee makes no move to draw on the Indian laws. It would appear the reason for this reticence lies in an underlying view that “the United Kingdom is not a secular state”, and that “religious belief continues to be a significant component, or even determinant, of social values, and plays a major role in the lives of a large number of the population” (Committee 2003a: 38). For this reason, it is proper to entertain laws that protect not just the persons of members of religious communities, but also their faiths as such. This view would seem to be in part informed by the traditional conception of England as a state whose church is part of its constitution; but also in part by a kind of multi-culturalist ideology in which the state should have the role of embodying the religious identities of its constituent communities. Oscillating between a view of the laws as fundamentally directed towards maintaining the religious peace, and a view in which their role is to protect the religious freedom and (multi-)cultural identity of the nation, the Committee is in no position to use the former view as a means of grasping the character and limits of the latter.

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What is singularly missing from this spread of views is a sense of the way in which a deconfessionalised liberal state uses the criterion of public order as the base-line from which to make the necessary discriminations. This is a state whose forms of toleration are grounded neither in inalienable individual rights and freedoms, nor in the communal identities of its constituent religious communities. Rather, it is one which is defined by its task of governing of these communities in a way that pre-empts their mutual persecution. This is also the perspective missing from the arguments of both philosophical liberals and multicultural communitarians.
References


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