

## Gilding the Lily on Religious Hatred

*Francis Bennion*

Mr Tony Blair, the British Prime Minister, is one of those determined men. Once he has decided on a course he sticks to it. Starting the Iraq war showed that. He sticks to it even when it has become apparent that his decision was mistaken – even foolish. Continuing the Iraq war shows that. Britain's Iraq misadventure is an instance of what in a recent book I called the blight of Blairism.<sup>1</sup>

Another thing that shows Mr Blair's determination in the face of reasoned opposition is his decision to create the offence of inciting religious hatred. He has made several attempts to achieve this objective, beginning with the introduction in 2001 of the Anti-Terrorism, Crime and Security Bill. This would have punished manifestations of religious hatred, which it quaintly described as hatred against a group of persons defined by reference to religious belief or lack of religious belief. It did not define 'religious belief', which is a notoriously inexact phrase. I said in *The Times*:

It will be punishable 'religious hatred' to criticise a bunch of atheists. Is this really what we want our laws to do? The penalty for this newly-invented thought crime will be imprisonment for up to seven years. That might be inflicted on a comic who jeers at so-called religions that chop off a thief's hand or stone to death a woman caught in adultery. Is this really what we want?

Or an earnest do-gooder might be imprisoned for criticising so-called religions that prevent a desperately ill child being given a blood transfusion. Again, is that what we want? I myself am an agnostic, with no desire to defend atheists who presume to have greater knowledge of the Universe than is given to mankind. I claim the right to criticise them. Do I really deserve to be locked up?

The same goes for the multitude of people who endlessly debate faith, and argue for ever about our place in the cosmos. It is what humans have done from time immemorial, so far without challenge.

Will Mr Blair kindly get off our backs?<sup>2</sup>

There is powerful external evidence for rejection of the Blairite thinking on this point. For example a former Attorney General of India, Soli Sorabjee, said:

... experience shows that criminal laws prohibiting hate speech and expression will encourage intolerance, divisiveness and unreasonable interference with freedom of expression. Fundamentalist Christians, religious Muslims and devout Hindus would then seek to invoke the criminal machinery against each other's religion, tenets or practices. That is what is increasingly happening today in India. We need not more repressive laws but more free speech to combat bigotry and to promote tolerance.<sup>3</sup>

Mr Blair's 2001 attempt failed. You will search the 129 sections and eight Schedules of the Anti-Terrorism, Crime and Security Act 2001 in vain for any mention of religious hatred, though you will find there another iniquitous provision about religion that did make it to the statute book, namely section 39. This introduced to British law the concept of the religiously aggravated offence. It imposed for public order offences, assaults, criminal damage, harassment etc the greatly increased punishment of imprisonment for seven years where the

<sup>1</sup> See FAR Bennion, *The Blight of Blairism* (Oxford: Lester Publishing, 2002).

<sup>2</sup> *The Times*, 19 Nov 2001 (lead letter).

<sup>3</sup> SJ Sorabjee, cited in *HL Hansard*, 11 Oct 2005, col 175.

offence had a religious motivation rather than say the motivation of greed, lust, covetousness or any other of the seven deadly sins. This is illogical and unjustified. I would call it a disgrace to our law.

Of course Mr Blair did not obey my injunction and get off our backs with regard to creating an offence of religious hatred. His latest attempt is currently before the Westminster Parliament in the form of the Racial and Religious Hatred Bill. This uses exactly the same absurd definition of religious hatred as that referred to above. The unjustifiable impact of the Bill was pointed out by the former Lord Chancellor Lord Mackay of Clashfern in a passage of such importance that it needs to be quoted in full:

The Prime Minister said quite plainly, following the events of 7 July, that the people who committed those atrocities did so in the light of receiving a religious teaching that is a perversion of Islam – not Islam; a perversion of Islam. So far as I can see, nothing in the Bill would prevent a perversion of Islam being just as much a religion as Islam itself . . . it is difficult to say that a perversion of Islam is not a religion. If it is, there is the question of religious hatred in relation to the perpetrators. The Prime Minister said that such people who teach and glorify terror and who preach that it is lawful and praiseworthy to kill innocent people on the streets of London are “vicious and appalling”. That is not exactly a description calculated to endear them to you; quite the opposite. Surely,

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that is an obvious stirring up of appropriate disapprobation of those people. It is apparent that the Government are now thinking of proposing to close certain religious establishments on the basis that that perversion of Islam is being presented to the people who go there. Your Lordships may have seen the moving description given by the widow of one of the London bombers of the way in which her husband’s mind had been poisoned by his attendance at a certain mosque. That appears a clear example of a religious belief that has brought about conduct in the people who preach it and give effect to it that is properly worthy of insult and hatred.’<sup>4</sup>

The Racial and Religious Hatred Bill has passed the House of Commons and at the time of writing is proceeding through the House of Lords. Introducing the Bill on second reading the Lord Chancellor Lord Falconer give only one justification for it:

... there is an inequality in the level of protection provided to Jews and Sikhs and to other faith groups. Jews and Sikhs, as a result of case law, are protected from having hatred stirred up against them under the existing offences of incitement to racial hatred. We believe that the same level of protection should apply to all faith groups and to those without religious belief.<sup>5</sup>

The obvious falsity of this argument was exposed by the Liberal Democrat peer Lord Lester of Herne Hill QC. Muslims, Hindus and members of any other faith group are also ‘protected from having hatred stirred up against them under the existing offences of incitement to racial hatred’ where, as is usually the case, the grounds for stirring up hatred are racist. Lord Lester said:

‘The noble and learned Lord, Lord Falconer, argues that the present law on racial incitement discriminates in favour of Jews and Sikhs and denies equal protection to Muslims and other religious groups. With the greatest respect, that is not the case; and indeed the noble Baroness, Lady Scotland [a Government minister], admitted as much during the debate in Committee on the Equality Bill. Jews and Sikhs are protected against incitement to racial hatred because of their ethnicity and not their religion or belief. Stirring up hatred against Muslims because of their Asian ethnicity is equally protected. There is equal protection under existing law except in relation to the obsolete common law offence of blasphemous libel, which protects only Christianity against gross insult and should in my view be repealed as the Law Commission recommended

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<sup>4</sup> *HL Hansard* 11 Oct 2005, cols 170-171.

<sup>5</sup> *HL Hansard* 11 Oct 2005, col 162.

years ago.<sup>6</sup>

Lord Lester pointed out that if it was really feared that racists would mask what was really a racist attack by dressing it up as an attack on the person's religion this could be dealt with by a suitable amendment to the Bill. He said:

Because of the frequently repeated statements that the law does not give equal protection I drafted an amendment last time round, flatteringly referred to as the "Lester amendment", to make it clear that hate speech, where it is used as a proxy for race—that is, where the defendant pretends that Islam is a target whereas in fact it is the group's ethnicity that is the real object of incitement to hatred—is covered by race hate legislation. Ministers criticised the amendment as unnecessary and too complicated. I do not believe that it is too complicated for a jury to have to unravel the purpose of a given course of conduct and I believe that it would be helpful to make the law clear, and to remove the other new offences from the Bill having done so.<sup>7</sup>

Indifferent to this helpful suggestion, Lord Falconer offered as a palliative the fact that the Bill requires the consent of the Attorney General to a prosecution and also that it has been amended to rule out a citizen's arrest. In fact these are badges of its unsuitability to be part of the criminal law. Either an act committed with the necessary mental element is a crime or it is not a crime – or that should be the position. It is true that, as I keep finding it necessary to remind people (even the Attorney General himself), that officer is charged under the British constitution with the exclusive right to decide whether or not a prosecution should proceed.<sup>8</sup> That arises under the general law, and gives the Attorney General the power to halt any prosecution. It should be a sufficient safeguard in itself. To impose the additional *ad hoc* restriction that a prosecution cannot even be initiated without the Attorney General's consent, though often done, is bad practice. It signals that Parliament is uneasy about creating the offence. It takes away the right of private prosecution, which has recently received judicial confirmation of its constitutional value.<sup>9</sup>

Another spurious argument used by Lord Falconer was that, because a commitment to introduce the Bill was included in the Labour Party's manifesto for this year's general election and the Party was successful in that election, therefore the electorate 'has clearly indicated its support' for the Bill.<sup>10</sup> It is not the case that when a party's supporters vote for it in an election they are voting for everything in the party's manifesto. Every manifesto

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contains some things that some supporters dislike, but they must disregard them if they are to get their party elected.

The Bill has been widely criticised as an unjustified infringement of freedom of speech. Home Office ministers, led in the Commons by one Paul Goggins, have constantly answered this by saying that to attack a particular *belief* as being barbarous, cruel or otherwise abominable is not in any way to attack *persons* who hold and practise that belief. Obviously that is nonsense. To say that a belief is barbarous and cruel must be to attack anyone who holds it.

I have encountered this Goggins before. He led for the Home Office when the Sexual Offences Act 2003 was going through Parliament. I could make no impression on him then with my reasoned arguments, now set out in two books.<sup>11</sup> I could make no impression on him

<sup>6</sup> *HL Hansard*, 11 October 2005, col. 174. On repeal of the blasphemy law see F. A. R. Bennion, 'A New Reason for Blasphemy Reform' 169 JP (2005) 588, 609, 629.

<sup>7</sup> *Ibid.*

<sup>8</sup> See FAR Bennion, 'Does the Attorney General Know His Job?' 169 JP (2005) 248.

<sup>9</sup> See *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29, [2002] 4 All ER 193, *per* Sedley LJ at [55]: 'Private prosecutions are still permissible and from time to time prove their value as a longstop behind an inert public authority'.

<sup>10</sup> *HL Hansard*, 11 Oct 2005, col 164.

<sup>11</sup> See FAR Bennion, *Sexual Ethics and Criminal Law* (Oxford: Lester Publishing, 2003); FAR Bennion, *Sexual Offences Act 2003 – Briefing on Sexual Offences by Children* (3rd ed, 2003, see <http://www.francisbennion.com/pdfs/fb/2003/2003-009-sex-offences-3rd-full-2003-act.pdf>). Like all my writings mentioned here, these are on my website, <[www.francisbennion.com](http://www.francisbennion.com)>.

either when arguing against the Racial and Religious Hatred Bill. Lord Lester of Herne Hill answered the Goggins contention:

The Home Office says that free speech is safe because it will not be unlawful under the Bill to criticise beliefs, teachings or practices of a religion or its followers by claiming that they are harmful, or to express antipathy or dislike of a particular religion or its adherents. It is unclear to me why such activities would not be unlawful. Such uncertainty is dangerous. Not only would it have a chilling effect on free speech, but it also raises false expectations for those who seek an extension of blasphemy law.<sup>12</sup>

Earlier he had said on freedom of speech:

It should cause concern to the Government, for example, that Sir Iqbal Sacranie OBE, the leader of the Muslim Council of Britain, still believes, according to his public utterances, that the new offences will enable Salman Rushdie to be prosecuted for publishing his novel *The Satanic Verses*. Freedom of speech, like equality and freedom of religion, is a fundamental civil and political right. Its protection is at the heart of our liberal democratic society. The right to freedom of speech means the right of everyone to communicate information and opinions without unnecessary state control or interference. That includes evil ideas expressed intemperately or in ways that shock, disturb or offend some sections of society. It includes insulting and offensive criticism of religious beliefs and practices – whether traditional religions or new religions or cults – provided it poses no imminent threat to public order.<sup>13</sup>

No doubt Mr Blair will get his way on this as on so much else. He has even threatened to use the Parliament Acts 1911 and 1949 to force this Bill through.<sup>14</sup> His ability to do that was confirmed by a recent House of Lords decision upholding the validity of the Hunting Act 2004.<sup>15</sup> In the eight years that he has been in power Mr Blair has been responsible for the creation of a large number of new offences. I have a question for him. *How does he think Britain managed without these offences for so many centuries?*

I leave the final word on the Bill to Lord Mackay of Clashfern. He is a more learned legal scholar than the present Lord Chancellor, who in the new dispensation introduced by Mr Blair is not considered to need such a qualification.

We seem to be trying to gild the lily in a way that is quite unnecessary, when existing law makes adequate and proper provision for all the circumstances that one can see.<sup>16</sup>

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<sup>12</sup> *HL Hansard*, 11 Oct 2005, col 174.

<sup>13</sup> *HL Hansard*, 11 Oct 2005, col 173.

<sup>14</sup> See *HL Hansard*, 11 Oct 2005, col 171.

<sup>15</sup> *Jackson and others v. Her Majesty's Attorney General* [2005] UKHL 56.

<sup>16</sup> *HL Hansard*, 11 Oct 2005, col 171. To save readers writing in about my use of Lord Mackay's misquotation for the title of the present article I should say that I am aware that what Shakespeare actually wrote was 'To gild refinèd gold, to *paint* the lily . . .Is wasteful and ridiculous excess' (*King John* 4.2). Byron's comment is relevant here:

'But Shakespeare also says, 'tis very silly

To gild refinèd gold, or paint the lily.'

(*Don Juan* 3.76.)